THE CATHOLIC UNIVERSITY OF AMERICA
CANON LAW STUDIES
No. 100

CANONICAL LIMITATIONS ON THE ALIENATION OF CHURCH PROPERTY

AN HISTORICAL SYNOPSIS AND COMMENTARY

A DISSERTATION

Submitted to the Faculty of Canon Law of the Catholic University of America in Partial Fulfillment of the Requirements for the Degree of

DOCTOR OF CANON LAW

BY

REV. JOSEPH F. CLEARY, J.C.L.,
of the Diocese of Hartford

THE CATHOLIC UNIVERSITY OF AMERICA
WASHINGTON, D. C.
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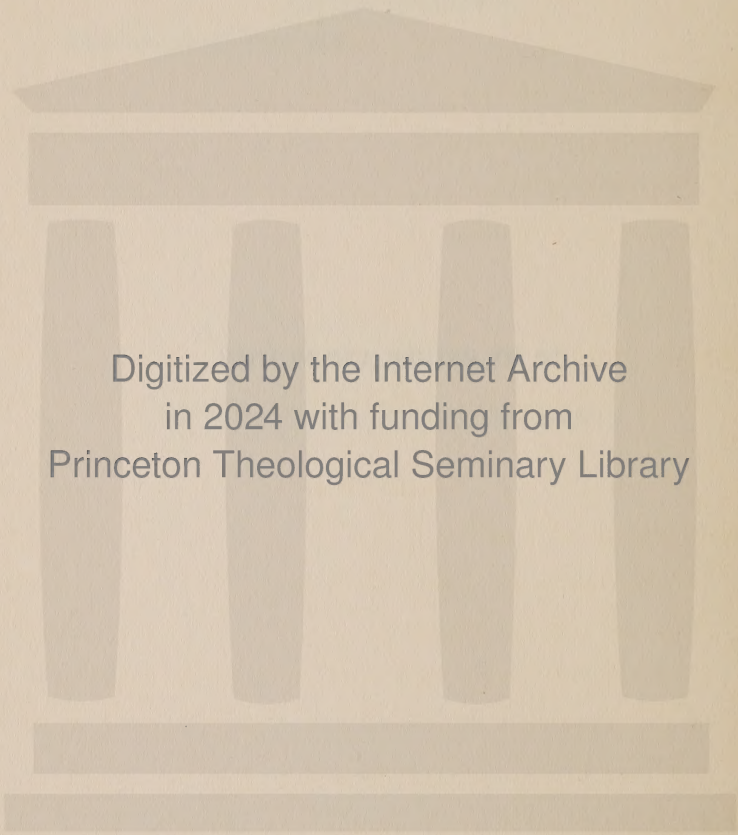
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FOREWORD

Following the injunction of her Divine Founder, the Church has from the earliest times rightfully considered her belongings as the patrimony of the poor, and has not hesitated to alienate them in order to practice Christ's sublime precept of charity. Likewise, from time to time a pressing need or manifest utility has indicated the wisdom of a judicious transfer or disposal of property. But the conservation of her patrimony has always remained the general rule. Since the canons consider as church property only those possessions of ecclesiastically established moral persons, and since the status of a moral person before the law is that of a minor, the acts of disposal of that property by an administrator in whom the title to it is not vested must necessarily be controlled. Therefore, the object of this dissertation is to set forth for the reader the limitations placed on the office of an administrator of church temporalities and the competence of the proper ecclesiastical superior whose permission is required for a valid act of alienation of church property.

The study of temporalities tends to perplex and confuse one by its vastness and multiple ramifications. Consequently, this monograph necessarily restricts itself to a study of the laws of the Church governing the alienation of church property by the secular clergy. No attempt is made to set forth the legislation on alienation for the Religious. The meaning of "alienation" is restricted to contractual alienation. "Alienation," in the loosely accepted sense of the term, resulting from violence, civil statutes (mortmain, eminent domain), theft, confiscation, usurpation, or secularization of church property, has been excluded from consideration.

The monograph takes up the study of the direct transfer of title and the clouding of title of all kinds of church goods. It considers the restrictions placed thereon in Roman Law, the Councils, the Decretals, Bulls and Constitutions of the Popes, decisions of the Roman Congregations, the Code of Canon Law, and contemporary American Civil Law.

Roman law has made several valuable contributions to the theory of the law on alienation of church property, and therefore it is treated in a separate chapter. There is also a chapter dealing with

the main points of the practice of the civil courts of the various United States where it concerns the subject, because the alienation of property entails definite civil responsibility. An historical synopsis is included in the interest of clarifying the present legislation by tracing its development in the past centuries of the Church. A preliminary study on the fundamental notions of alienation, church property, and contracts in general and in particular, is not out of place. It serves to eliminate beforehand many obstacles to a better understanding of the general law of the Church on alienation of property, contained in Canons 1530-1534 of the Code of Canon Law. The penal sanctions of Canon 2347 against unlawful alienation are also considered.

Much aid has been derived from such Catholic University studies as *The Tenure of Parochial Property in the United States of America,* by the Rev. Dr. Bartlett; *Church Property: Modes of Acquisition,* by the Rev. Dr. Doheny; *The Canonical Juristic Personality with Special Reference to its Status in the United States of America,* by Dr. Brown; *The History of the Legal Incorporaton of Catholic Church Property in the United States of America,* by the Rev. Dr. Dignan, and *The Canon Law of Wills,* by the Rev. Dr. Hannan.

The author wishes to take this occasion to express the profoundest gratitude to the Most Rev. Maurice F. McAuliffe, D.D., Bishop of Hartford, for the opportunity of advanced study which his promotion of clerical scholarship has afforded.

The present dissertation has been prepared under the supervision of the Faculty of the School of Canon Law of the Catholic University of America and has been submitted in partial fulfillment of the requirements for the degree of Doctor in Canon Law. The writer is deeply appreciative of the invaluable assistance and suggestions given him by the Rev. Dr. Edward G. Roelker. He is also grateful to his other professors, the Rev. Dr. Valentine T. Schaaf, O.F.M., dean of the School of Canon Law, Rev. Dr. Louis H. Motry, Rev. Dr. Francesco J. Lardone, Rev. Dr. Clement V. Bastnagle, and Rev. Dr. Robert J. White. He likewise wishes to thank the librarians of the University Library for the gracious assistance they rendered him on many occasions.

CANONICAL LIMITATIONS ON THE ALIENATION OF CHURCH PROPERTY

CHAPTER I

PRELIMINARY NOTIONS

The Church has the inherent right to set up for herself a patrimony, to administer and use it with complete independence.[1] She would not be mistress of her goods if, along with the right to hold and administer property, she had not the right to dispose of it. The right to alienate is indispensable for the useful management of her interests. It is essential to the adequate provision for all the needs which the normal functioning of any social organism presents.

On the other hand, it must be remembered that although a part of the goods she possesses was given without condition or reserve, or was given to provide for urgent and transitory necessities, yet some of her property at least was entrusted to her with the tacit or expressed condition that it is to remain indefinitely in the service of a determined work. Therefore, the power which the Church has to dispose of her goods is, in principle, bound up in the will of the founder or donor.[2] The Superior consenting to the alienation has the obligation of ascertaining whether or not there are any such limitations before granting permission.[3]

Furthermore, moral persons have the status of minors before the law, and are necessarily represented in their affairs by official administrators.[4] That is, legitimately erected ecclesiastical moral persons, such as church corporations, cannot by themselves perform the various acts of a juridical existence, as acquisition, administration, and alienation of property, although they hold valid title to the property they possess.[5] However, the attributes of their representatives do not in Canon Law exceed the domain of administration. Thus it results that they can proceed to acts of disposal or alienation of property only following a procedure which sufficiently

[1] Canon 1495, § 1.
[2] Couly, *Dictionnaire de Droit Canonique*, art. "Alienation."
[3] *Cf.* Canon 1532, §§ 2, 3.
[4] Canon 100, § 3.
[5] Canons 1499, § 2; 1495, § 2.

guarantees the interests of the corporation confided to their care.[6] Likewise, it must be noted that the common law of the Church does not allow an act of of alienation of church property to take place unless there are just reasons for the disposal.[7] This is an important consideration and must be kept in mind by Superiors and their consultors when passing judgment on the advisability of proposed alienations.[8]

Concept of Alienation

The Code understands the concept of alienation in the strict sense, that is, uniquely as a contract. Any confusion on this point has been avoided by placing the canons regulating the alienation of church property under the title *De Contractibus*. The ancient nomenclature of the Decretals, *De rebus Ecclesiae alienandis vel non,* is now abandoned. A concept of alienation which would envelop such notions as theft, usurpation, confiscation, etc., must be discarded. Alienation supposes primarily the transfer of legal title.

Alienation is not to be considered as something to be abhorred, having a certain inimical force, but rather as one of those legitimate rights which the Church as a perfect society has over her own property once acquired—the right of disposal. The legislation of the Code is the attempt to keep this right within its proper limits.

Canonically, then, alienation may be defined as any act or contract whereby church property is exposed to danger of loss, or its legal possession is reduced to a worse condition. It is that act by which property, real rights, or possessions of any ecclesiastical moral person are gratuitously or onerously transferred, set aside, lessened, or burdened.[9]

[6] Canons 1529, sqq.

[7] Canon 1530, § 1, n. 2; Wernz, *Jus Decretalium,* III, 183.

[8] Pejska, *Jus Canonicum Religiosorum,* p. 70: "Dubio procul haec intelligenda sunt, ceteris paribus, quia bona ecclesiastica personis indignis, rei Catholicae infensis, vel hebraeis, sine populo scandalo vendi vel locari nequeunt, qui proinde a licitatione a priori excludantur." *Cf.* Vromant, *De Bonis Ecclesiae Temporalibus,* n. 294: "Verum semper manet quod leges inductae ad servanda bona ecclesiastica non debent cedere in eorum detrimentum."

[9] Canon 1533; Wernz, *Jus Decretalium,* III, 151; Woywod, "The Law of Contracts Concerning Ecclesiastical Goods," *HPR,* XXX (1930), 270.

The contracting of debts and obligations, or engaging and giving in surety, is likened to alienation by Canon 1533. The canon includes all contracts or negotiations granting to others the right to demand the performance of any duties or their omission, and which entail a financial burden. The purpose of the canon is not changed even though certain financial profit may be foreseen from such transactions. Church administration tends toward tutiorism and frowns upon profits obtainable through dire legal consequences. In the more proper sense of the canon, obligations are to be distinguished from alienation and restricted to those acts, contracts, and dealings, which, though the church is tied up with a financial burden, cannot properly be considered alienation.[10]

The concept, therefore, broadens to include the transfer, concession, or remission of a real right (*jus in re*) by contract, gratuitous or onerous, in which ownership is restricted.[11] This situation may be brought about in any of several ways. An active servitude may be relinquished which the church or institution enjoyed in relation to the neighboring fields or buildings, such as access to light, thoroughfare, or water, etc., and which cannot be ceded without alienation. Again, the servitude may be a passive one, such as church property so bound to another physical or moral person that the ceding would likewise entail alienation.[12]

In modern civil law the ancient concept of servitudes is known under the name of easements or license. An easement is the right of one land owner to the limited use of the land of another for a special purpose. The owner of the land which is used is the servient owner and the owner of the right is the dominant owner. There are two different types of easements; one, affirmative, as for example, the right to pass over another's land, and the second,

[10] Canons 1533, 1538, 1540-1543; Molina, *Tractatus de Justitia,* disp. 465; Pirhing, *Jus Canonicum in quinque Libros Decretalium,* lib. III, tit. 13, n. 1; Vermeersch-Creusen, *Epitome,* II, 855; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 296; Munerati, *Juris Ecclesiastici Publici et Privati Elementa,* n. 331; Chelodi, *Jus de Personis,* n. 261; Blat, *De Personis,* n. 598.

[11] Wernz, *Jus Decretalium,* III, 154; Vermeersch-Creusen, *Epitome,* II, 851.

[12] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 296.

negative, which prohibits something which would otherwise be lawful, as for example, interrupting light and air from a building.

There are three different ways in which easements may be acquired: by express grant, by implied grant, and by prescription. By express grant is meant by words in the deed which transfer either estate. What is meant by an implied grant is that one party sells another a piece of land, enclosed or surrounded on all sides by land belonging to the grantor or seller. The party who buys must have a right of way across the grantor's land, or an easement. Prescription operates when an easement is acquired by long use. If one should walk across the land of another for twenty years, he would acquire as good a right to do so as if he had been given it in a deed. It is quite difficult at times to tell whether the right has been acquired fully. The courts in this country began to regard the duration as twenty years or about the same as the statute for the acquisition of land by adverse possession. The sale of the dominant estate always included the easement appended thereto.

The civil law is very strict that a person use the easement which has been given to him, and he cannot go beyond it without becoming a trespasser. At common law the owner of the dominant estate is bound to keep a way in repair though the owner of the servient estate may, by contract, or prescription, be required to make the necessary repairs. The easement can neither be acquired nor surrendered by oral contract. One form of easement which is sometimes met today is the natural right of lateral support of land. It is fundamental that no person can use his land so as to injure another; therefore, if one should excavate to the edge of the land of another, and his neighbor had a building there, he could not continue to excavate if it was likely to injure his neighbor's building.

An easement may be lost in a number of ways. It may be released by the owner of the dominant estate to the owner of the servient estate. It may be lost by abandonment or non-use for the length of time required to acquire it by prescription.[13]

A dispensation or license properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful

[13] Robinson, *Elementary Law*, nn. 57, 58.

which without it had been unlawful. Thus a license to hunt and kill one's game, to use and burn one's coal, as to the actions of hunting and warming, are licenses, but it is consequent necessarily to those actions that the owner's property is destroyed in the game killed and the coal burned. So, as in some cases, consequently and not directly, and as its effect, a dispensation or license may destroy and alter property.[14]

The canonical concept of alienation reaches out to include stipulations as well: the giving in security, the taking of special mortgages and the granting of long-term leases.[15] Special mortgage is mentioned in opposition to general mortgage because only the former, which places a burden on a specified piece of church property, is specifically considered alienation by the canon, although it remains to be seen in the individual case whether a general mortgage is controlled by Canon 1533 which requires the canonical formalities for the contracting of debts and obligations.[16] The leasing of church property beyond a period of nine years is considered to be a long-term lease and therefore alienation. A lease of less than nine years in duration cannot be termed actual alienation. However, due to the danger which the Church believes to exist in an inordinate practice of leasing, special rules have been formulated for these shorter-termed leases.[17] The refusal to accept money or donations made to a church is not an act of alienation, although frowned upon if done without cause.[18]

Church Property

The legislation on alienation and debts or obligations concerns only church property. Within the meaning of church property must be understood all manner of temporal goods which belong

[14] Robinson, *Elementary Law,* n. 89.

[15] Canons 1538, § 1; 1541, 1542, § 1.

[16] Canon 1538, § 1; *cf.* Vromant, *De Bonis Ecclesiae Temporalibus,* n. 296.

[17] Canon 1541; Vermeersch-Creusen, *Epitome,* II, 861; Vromant, *op. cit.,* n. 338.

[18] Canon 1536, §§ 2, 3; Schmalzgrueber, lib. III, tit. 13, n. 13; Aichner, *Compendium,* n. 226.

either to the Universal Church or to the Holy See, or to any other moral person which has a legal existence in the Church.[19]

According to the accepted concept of property, church goods may be classified first into corporeal property, consisting of those possessions having an individual existence, clear and determined, such as building or a piece of land, and susceptible of a *jus in re*.[20] Corporeal property may be regarded as movable and immovable according to whether the objects are immovable by nature, destination, or determination by the law, or whether they are essentially transportable with no fixed abode.[21] Despite the silence of the lawmaker, the Code on this point would seem to admit of all the distinctions established by the civil law, considering the fact that Canon 1529 appeals to the civil law proper to each nation for the regulation of contracts drawn up by ecclesiastical moral persons. Since the contracts in question essentially concern property, it seems that *nisi juri divino contraria sint, aut aliud jure canonico caveatur,* the notion and distinction of property should be accepted in the same manner as the theory and form of contracts. It appears the only way to avoid misunderstanding and to suppress in advance much disagreeable and often costly litigation.[22] Church property may likewise consist of incorporeal goods such as the rights and credits of one physical or moral person over another.[23]

Sacred objects are those movable or immovable goods destined for divine worship by consecration or benediction. Precious objects are those which have a notable value from the point of view of artistry, material, or history.[24]

[19] Canon 1497, § 1; even where it concerns property, the Holy See and the Universal Church must be regarded as two different entities possessing distinct patrimonies. See Canons 2345 and 2346.

[20] Canon 1497, § 1; Woywod, "Temporal Goods of the Church," *HPR,* XXIX (1929), 978.

[21] St. Willems, "Bona Corporea, Fungibilia et Non-fungibilia," *Collationes Brugenses,* XXX (1930), 263-, 338-.

[22] *Cf.* Washburn, *A Treatise on the American Law of Real Property,* (6 ed., 3 vols., Boston, 1902), I, 1-.

[23] St. Willems, "Bona Incorporea," *Collationes Brugenses,* XXX (1930), 291-.

[24] Canon 1497, § 2.

When the canons on alienation mention the "Church," they do not always refer to the Universal Church or to the Holy See, but sometimes to other moral persons having a juridical existence within the Church. However, the context and the nature of things must be taken into account in interpreting the individual canon.[25]

The canons on alienation concern not only parish property but also hospitals, orphan asylums, seminaries, and other ecclesiastical entities which are canonically established moral persons and can own property. A parish society or a church society must be established as an ecclesiastical moral person by the authority of the local Ordinary before its property can be considered as church property.[26]

Church property does not cease to be church property even though the moral person possessing the property is not recognized by the civil law. The law which regulates alienations and obligations is to be applied also to legal dealings between two distinct ecclesiastical moral persons.[27]

Movable property which is destructable by its nature on first use does not come within the meaning of canonical alienation.[28] These items of movable property may be enumerated as produce of the land, animals and their offspring, industrial production, and the like. Their value to a corporate person consists uniquely in the possibility of alienation.[29] To movable property as thus defined must be assimilated also those things which by reason of their purpose and social nature are so perishable and essential for the necessities of life that their useful alienation in some manner is imperative. Prime among these is money.

A distinction, however, must immediately be made. Money by

[25] Canon 1498; Woywod, "Temporal Goods of the Church," *HPR*, XXIX (1929), 978.

[26] Schaaf, "Parish Societies," *AER*, LXXXVII (1932), 413; Vromant, *De Bonis Ecclesiae Temporalibus*, n. 37; Schmalzgrueber, lib. III, tit. 13, n. 4; Canons 1497, § 1; 1409; 1489, § 1.

[27] Wernz, *Jus Decretalium*, III, 156; Vermeersch-Creusen, *Epitome*, II, 851; A Coronata, *Institutiones*, II, 1070; Schmalzgrueber, lib. III, tit. 13, n. 2; Ferraris, *Bibliotheca*, v, "Alienatio," art. IV, n. 13.

[28] Canon 1530, § 1.

[29] Reiffenstuel, lib. III, tit. 13, n. 16.

its nature is, of course, a perishable thing and is not susceptible of continued use; that is, money is a medium of exchange and, as such, changes hands constantly. In itself, it has no stability, yet in modern practice money invested in a useful enterprise becomes a very tangible asset to any corporation. Thus, a second and derived concept of money as working capital must be considered, as opposed to idle money, solely a medium of exchange. To express this two-fold consideration, the terminology of "stable" and "non-stable" capital is used.[30]

Stable capital is that money which is invested in corporeal or incorporeal property, whether movable or immovable; for example, the investment may be in rights or credits, more precisely, mortgages, stocks, bonds, etc. Non-stable captal may be best illustrated by the example of money paid to a church in acquittal of a debt, or money donated as an outright gift. The same terminology has been extended to include all church property, placing on the one side all church goods properly so-called which require the solemnities of the law for alienation, and on the other side, as non-stable capital, those certain few items of property which, though actually belonging to a religious corporation, are not governed by the common law on alienation because of special conditions. An example of the latter is a legacy in which the intention of the donor stipulates that it be sold, or concerning which the civil law restricts the donor's capacity. However, a legacy establishing a foundation for Masses must be considered as a definite part of the patrimony of the church and subject to all the restrictions on alienation.[31]

[30] Vermeersch-Creusen, *Epitome,* II, 851; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 280; *cf.* Schmalzgrueber, lib. III, tit. 13, n. 50.

[31] Reiffenstuel, lib. III, tit. 13, n. 15; Ferraris, *Bibliotheca,* v. "Alienatio," art. III, n. 25; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 281 (4), is worth noting when he says: "In emporiis et magnis civitatibus exteris, pecuniae quae ad *capitale nondum pertinent,* possint quandoque a clericis procuratoribus seu oeconomis, *etiam ad tempus,* modo *valde frugifero* occupari in *extruendis vel emendis domibus aliisve aedificiis.* Cum alioquin domus istae vel aedificia *pecunias solutas, sortem stabilem nondum ingressas,* repraesentent, opinamur quod procuratoribus licet supradicta aedificia postea libere vendere, omissa qualibet alienationis solemnitate. *Absit oportet omnis species negotiationis.* (Nobiscum opinantur plures professores canonistae quos interrogavimus.")

Briefly, it may be stated that when money has become converted into immovable property, strictly invested in notes, or lawfully attached to the stabilized capital of a church corporation it is likened to immovable property and is subject to all the canonical formalities concerning alienation.[32]

Contracts

In virtue of Canon 1529 of the Code, the civil laws of one's country must henceforward be observed in the matter of contracts concerning the alienation of church property.[33] The prevailing law of contracts both general and particular, nominate and innominate,[34] is to be observed, as well as the laws regulating the manner of payments and the extinction of debts. The Code likewise recognizes the effects which the civil law attaches to these contracts and payments.[35]

One must consider as null and not binding, however, those dispositions of the civil law which are contrary to divine law, as for example, the divorce laws, or contrary to ecclesiastical law, at least the common church law.[36]

Thus, where there are no special provisions made in Canon law, it is not Roman law, but the civil law of each individual country that is henceforth to be followed in all matters of contracts concerning church property. In this respect the Code has changed

[32] *Cf.* Elenchus quaestionum in Epist. S. C. de Prop. Fid., 9-49—*A. A. S.*, XIV (1922), 281; Vromant, *op. cit.*, nn. 36, 281 (3).

[33] Canon 1529: "Quae jus civile in territorio statuit de contractibus, tam in genere quam in specie, sive nominatis sive innominatis, et de solutionibus, eadem jure canonico in materia ecclesiastica iisdem cum effectibus serventur, nisi juri divino contraria sint aut aliud jure canonico caveatur." Woywod, "The Law of Contracts," *HPR*, XXX (1930), 269.

[34] "Nominate" contracts are sale, lease, etc., "innominate" contracts are contracts of "do ut des, do ut facias," etc., which have no specific name.

[35] Cocchi, *Commentarium in C. J. C.*, n. 211; *cf.* S. C. de prop. Fid., decretum (pro Statibus Americae Foederatis), 15 Dec., 1840—*Coll.*, n. 916; S. C. Conc., *Romana et aliarum*, 23 Jan., 1923—*A. A. S.*, XV (1923), 513, 514.

[36] Should particular church law be preferred to the civil law? Vermeersch-Creusen, (*Epitome*, III, 850), and Cocchi, (*Commentarium*, III, 407) believe so.

the pre-Code practice. Ecclesiastical administrators have the obligation to know and apply the civil legislation relative to contracts in general and in particular, to payments and to the different effects of these juridical acts. Therefore, a contract pertaining to church matters, when null or when valid according to the civil law, must be held as such both in the external and internal forum, unless, of course, divine law or Canon law is opposed.[37] An example may be found in the rule of Canon 1513, § 2, concerning last wills and testaments of the faithful where the Church is the beneficiary.[38] In the event that the civil formalities have been omitted, the heirs are obliged in conscience and in justice to carry out the will of the testator, and they should be informed of this obligation.[39]

There can be no question, of course, as to the power of a moral person to make a contract, though legally a minor. The power to make contracts is granted in general terms in the charters of all the various church corporations. The power to make contracts is closely connected with the power to buy, sell, mortgage and lease property. In fact, it is so closely allied that without the power to make contracts, property could not ordinarily be acquired or alienated.[40]

In American civil law the theory of contracts has been reduced to uniformity by the American Law Institute by its *Restatement of the Law of Contracts.* The meaning of a contract has been defined in Section 1 as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

The promise in a contract must be stated clearly in words,

[37] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 274; Neary, "Correlation of Canon and Civil Contract Laws," *IER,* XXVIII (1926), 402-409.

[38] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 156. Ecclesiastical moral persons and not physical persons are understood by the canon.

[39] Génicot-Salsmans, *Institutiones Theologiae Moralis,* n. 675; Claeys-Bouuaert-Simenon, *Manuale Juris Canonici,* n. 1001; DeMeester, *Compendium,* III, 1466; C. I. C., 17 Febr., 1930, ad V—*A. A. S.,* XXII (1930), 196.

[40] *Cf.* Woywod, "The Law of Contracts Concerning Ecclesiastical Goods," *IIPR,* XXX (1930), 381-389; Zollmann, *American Church Law,* n. 187; Neary, "Contracts," *IER,* XXVIII (1926), 402.

either oral or written, or must be inferred from the conduct of the party.

Contracts may be made entirely oral, or the terms of the contract may be gathered from a number of letters, telegrams, and other means of communication. The best practice is to reduce the terms of the contract to a written document which all parties sign. Once the negotiations and terms of a contract have been reduced to writing, the document is considered as embodying all the terms of the contract. Courts of law will not permit the introduction of parol testimony to vary the terms of a written contract at any subsequent time. When a seal is added after the names of the signers it is supposed to make a more formal document, one which the parties have very carefully considered. The adding of the seal is supposed to be a solemn ceremony, although in most States of the Union all a person needs to do is to write "L. S." and put a circle around the letters. Some States still require a wafer or a small piece of paper to be attached to the document. One of the great distinctions of such a document is that the seal imports a consideration. In other words, the person who sues on a contract under seal would not have to prove a consideration to make a case. What is meant by consideration in a contract has been defined by the *Official Draft of the American Law Institute,* "Contracts," Section 75, as follows: "(1) Consideration for a promise is (a) an act other than a promise, or (b) a forebearance, or (c) the creation, modification, or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise. (2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or some other person."

In order to form a contract there must be two or more persons who desire to enter into contractual relations. The persons must have a contractual capacity. A person cannot be a party to a contract if he is an infant or a person of less than legal age (in most States, twenty-one years), insane or forced or tricked into the contract.[41]

An offer must be made to do or not to do a legal act, by one

[41] Williston, *The Law of Contracts* (4 Vols., New York, 1920), I, n. 222.

party to the contract. The other party to the contract must assent to the offer. The assent may be by word of mouth, acts, or written words. These acts are usually spoken of as the "offer" and "acceptance." The way to make an offer irrevocable is to pay a small part of the consideration at the time of receiving the offer or option. Section 46 of the *Official Draft of the American Law Institute,* "Contracts," expresses it as follows: "An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself or, if no time is fixed, within a reasonable time, either by revocaton or by the offeror's death or insanity."

The acceptance of the offer makes the contract. In order to be an acceptance, the offeree must indicate that he unequivocally accepts the offer exactly as it is made. An acceptance which adds further qualifications is not an acceptance but is a counter-offer. Once a person accepts an offer he is bound by the contract regardless of whether he knew the written terms or their proper legal interpretation.[42]

After a contract has been made, it can only be discharged in one of five ways. First, it can be discharged by agreement of the parties, or (2) by full and complete performance and termination by its own terms, (3) by breach, when one party breaks the obligation imposed upon him, (4) when by an act of God or otherwise the performance is impossible, and (5) by operation of law, when a party becomes bankrupt or a document is found altered by erasure or addition. This applies to verbal contracts as well as to written contracts.

Where a breach of contract occurs, the party who has fulfilled his obligations may sue at law to recover damages caused by the breach. The measure of damages is, so far as money can do so, to put him in the same condition he would be in if the other party had completed the contract. Damages are furnished by way of compensation and not for punishment.[43]

[42] Robinson, *Elementary Law,* nn. 158-160.

[43] Robinson, *Elementary Law,* nn. 161, 162.

In addition to the right to sue at law to recover damages, a party can go into a court of equity and in certain cases have the court decree specific performance of the contract. The court will order the party to do certain things such as make a deed to property. Once a contract is fairly made, however, a court of equity has no power to alter or reform an agreement between parties, since this would be, in truth, a power to contract for them. It can merely correct the writing executed as evidence of the agreement so as to make it clear as to what both parties actually agreed. Where both parties to an instrument thought they were executing a different contract from what they actually did, a court of equity will reform the instrument.[44]

Any instrument which has been procured by fraud, as a deed, obligation, contract, etc., may be set aside by a court of equity. The fourth section of the Statute of Frauds (common to all the States) provides that no contract or agreement for the sale of lands or leasing of them, that is not to be performed within one year from the time of making it, shall be valid, unless the agreement, or some memorandum of it, be made in writing and signed by the party who is to be charged with the payment therefor, or some other person lawfully authorized to sign for him. The clause in reference to the sale of land is perhaps the most important. The simple rule that to be enforceable any contract relating to land must be in writing and signed by the parties, should always be observed. A leasing of less than a year may be oral or a license, but such matters should always be in writing. The requirements of the instrument are very simple provided the party signs it some place. It does not make any difference whether he signs it at the beginning or the end, or what he uses to sign it with, as pencil, ink, chalk or anything else, so long as it is known to be his signature. It is well in preparing an instrument, in order to take the matter out of the provisions of the statute of frauds, to date it, name the parties, state what is to be done and define the terms of the contract.[45]

[44] Williston, *The Law of Contracts,* III, n. 1537.

[45] Robinson, *Elementary Law,* n. 353. A Uniform Fraudulent Conveyance Act has been adopted by a considerable proportion of the States; Williston, *The Law of Contracts,* I, n. 506.

Where a contract appears ambiguous, the courts try to determine what is meant by the parties from the construction of the document. The courts have evolved certain rules of construction. Where there is a conflict between the printed and written words, the latter will control. A contract will be construed most strongly against the maker. A contract susceptible of two meanings will be given the meaning which will render it valid. Whenever possible it will be construed to render it reasonable rather than unreasonable. The meaning which renders best the intention of the parties will be given. The intention of the parties will be collected from the whole document.[46]

The Federal Constitution in Article I, Section 10 (1), guarantees the liberty of contracts by forbidding any State to pass any "law impairing the obligation of contracts" and has been amended (fifth and fourteenth amendments) to the effect that neither Congress nor any State shall deprive any person of "liberty or property without due process of law."

[46] Williston, *The Law of Contracts*, II, n. 602.

CHAPTER II

ROMAN LAW

Restrictions on the Alienation of Church Property

It is an established fact that the Church acquired and held goods from the first centuries. But until the Church was recognized by Roman law in the fourth century the property she held was in a precarious state.[1] The Edict of Milan in 313 affirmed the right of religious corporations to hold property by decreeing the restoration to them of all confiscated buildings and lands which they rightfully possessed. The private property of Christians, however, was not included in the edict of restoration.[2] In 321 another right of the Church was recognized and safeguarded, namely, that of acquiring property by testaments.[3] This right to testamentary succession was further strengthened and defined by subsequent Constitutions in 390, 407, and 455.[4] Roman law, however, was much slower in developing a legal theory on the rights of the Church in the disposal of her property. The writings of the jurists do not consider the matter and even the Theodosian Code is silent. During these centuries the Church had, of course, developed her internal

[1] Doheny, *Church Property: Modes of Acquisition* (Washington, 1927), pp. 16, 19.

[2] Kirch, *Enchiridion Fontium Historiae Ecclesiae Antiquae* (4 ed., Friburgi Brisgoviae, 1923), nn. 352, 353.

[3] *Cod. Theod.*, XVI, 2, 4: "Habeat unusquisque licentiam sanctissimo Catholicae venerabilique concilio decedens bonorum quod optavit relinquere. Non sint cassa judicia." Knecht, *System des Justinianischen Kirchenvermögensrechtes,* Kirchenrechtliche Abhandlungen, hrsg. v. Dr. U. Stutz, XXII (Stuttgart, 1905), pp. 1, 5; Brown, *The Canonical Juristic Personality* (Washington, 1927), p. 22; Doheny, *Church Property: Modes of Acquisition,* p. 20; Gothofredus, *Commentarius* in hoc tit: "Concilium nempe est quodcumque tandem corpus speciale cuiusque loci. . . . Ut proinde fallantur . . . qui concilium hic pro synodo ecclesiastica accipiunt."

[4] *Cod. Theod.,* XVI, 2, 28; *Cod. Theod.,* XVI, 2, 38; *Nov. Marciani,* V, 2.

discipline for alienations, and then within the span of a very short time the theory of the Roman law grew to full maturity, signifying the close union of Roman law and Canon Law in the Eastern Empire.

A Constitution by the Emperors Leo and Anthemius in the year 470 is the first legislation in the Roman system concerning alienation of Church property.[5] Shortly afterward, at about the beginning of the sixth century, there followed a Constitution by the Emperor Anastasius.[6] This enactment, though wider in territorial scope than the former, known to posterity as the "Leonine Constitution," is much less complete. In the year 529 Justinian issued a short constitution concerning sacred vessels and vestments.[7] Then in 535, he issued a constitution which contained a summary of all the Roman law on church property alienation.[8] Between the years 535 and 538 appeared four short novels dealing with the subject, each in a particular way.[9] In 544, Justinian summed up the previous legislation in a constitution,[10] and in the following year came the final enactment of Roman law on alienation.[11]

The general principle of Roman law was to forbid all forms of alienation of church property.[12] Temples and altars, burial places

[5] *Cod.*, I, 2, 14; Grashof, "Die Gesetze der Römischen Kaiser über die Veräusserung des Kirchlichen Vermögens," *AKKR*, XXXVI (1876), 204; Knecht, *System des Justinianischen Kirchenvermögensrechtes*, Kirchenr. Abhand. hrsg. v. Dr. Ulrich. Stutz, XXII, 134; A Couly, *Dictionnaire de Droit Canonique*, v. "Alienation."

[6] *Cod.*, I, 2, 17.

[7] *Cod.*, I, 2, 21.

[8] *Nov.*, VII. In the preface of the Novel, Justinian states that the previous constitution of Leo is approved and extended. Its provisions were to concern not only the principal church of Constantinople but the whole Empire. The enactment of Anastasius was voided. An addition to the law of Leo, the seventh Novel is the complete expression of Roman law concerning the disposal of Church property.

[9] *Nov.*, XL (a. 535); *Nov.*, XLVI (a. 537); *Nov.*, LV (a. 537); *Nov.*, LXV (a. 538).

[10] *Nov.*, CXX.

[11] *Nov.*, CXXXI, 13 (a. 545).

[12] *Cod.*, I, 2, 14, pr.: "Nulli . . . esse facultatem . . . sub cuiuscumque alienationis specie . . . cedere"; *Cod.*, I, 2, 17, 1: "Omnem . . . alienationem cessare,

and holy things consecrated to the gods were considered *res sacrae* in Roman law. Belonging to the deities they were regarded by the law as *res juris divini* and consequently incapable of valuation, hypothecation, usucapion, or adaptation to any profane use.[13] They constituted a class apart, reserved from the ordinary exercise of ownership, and were very often thought to be the possessions of the gods. Strictly speaking, however, such property was considered as excluded from private ownership rather than belonging to any juristic personality or deity.[14]

The concept of alienation was generally understood to mean the sale, donation, exchange, and perpetual *emphyteusis* of ecclesiastical property.[15] The contract of perpetual *emphyteusis,* however, was not considered alienation, but something akin to it.[16] Likewise,

quocumque modo fiat"; *Nov.,* VII, 1: "Omnem alienationem interdicimus"; *Nov.,* CXX, 1: "Nullam habere licentiam . . . aut quolibet alio modo alienare."

[13] Gaius, II, 4; Sherman, *Roman Law* (3 vols., 2 ed., New Haven, 1922), II, 559, 560; Moyle, *Imperatoris Justiniani Institutiones* (5 ed., Oxford, 1923), p. 195; Sohm-Ledlie, *Institutes of Roman Law* (3 ed., Oxford, 1907), p. 302; Buckland, *A Textbook of Roman Law* (Cambridge, 1921), p. 184.

[14] Sohm-Ledlie, *Institutes of Roman Law,* p. 189.

[15] *Nov.,* VII, 1; *Nov.,* CXX, 1; Kormann, *Die Kirchenrechtlichen Veräusserungsbeschränkungen beim Katholischen Kirchengut,* Kirchenrechtliche Abhandlungen hrsg. v. U. Stutz, XLII (Stuttgart, 1907), pp. 3, 4, 142-145; Hofmeister, *Bischof und Domkapitel* (Neresheim, 1931), pp. 217 ff. Corporeal property was regarded as divided into movable and immovable. Movable goods comprised all those objects that could be moved from place without impairing their integrity. Immovable goods were those which, on the contrary, were fixed to a definite locality. *Dig.,* VII, 9, 1, 1; *Dig.,* XIX, 1, 40; *Dig.,* XLI, 1, 7, 10; *Dig.,* XLIV, 7, 44, 1; *Inst.,* II, 2. Besides property, Roman law also admitted of real rights (*e. g.,* servitudes) which were considered incorporeal things. *Dig.,* VIII, 1, 14; Ulpian, *Reg.* XIX, 11; Sohm-Ledlie, *Institutes of Roman Law,* p. 302.

[16] *Nov.,* VII, 1; a lease of *emphyteusis* is unknown in American or English law. It may be said to correspond somewhat to a 99-year lease. *Cf.* Scott, *The Civil Law* (17 vols., Cincinnati, 1932), XII, 23 note; in modern French law, such a lease may not be less than 18 years nor more than 99 years in duration. Loi du 25 Juin, 1902, art. I—cit. in Cance, *Le Code de Droit Canonique* (3 vols., 2 ed., Paris, 1929), III, 171; it is a lease on immovable property, giving the lessee a *jus in re* over the property as long as he paid the rent agreed upon; Leage, *Roman Private Law* (2 ed., London, 1930), p. 189.

the burdening of church property by a special mortgage was expressly forbidden.[17]

The restrictions on alienation affected all immovable church property: lands, fixtures attached to these lands, testamentary annuities,[18] churches, orphan asylums, infirmaries, buildings, fields, and gardens.[19]

All those who had any management of church property were bound by these restrictions, in particular, the actual administrators.[20] Bishops and priests in going to another charge were forbidden to alienate any church property, whether movable or immovable, that had come into their possession since consecration or ordination, to their friends, relatives or anyone else. If they wished to dispose of the property they were obliged to donate it to some pious cause. They could take with them only what they could prove was originally theirs.[21]

While all forms of alienation were strictly forbidden by Leo, certain relaxations were introduced by Justinian. Alienation of church property was permitted when such a course of action was necessary in order to pay off debts incurred, both fiscal and otherwise. However, a system of rules was drawn up so as to prevent irregularities in these transactions.[22]

If any churches or other items of ecclesiastical property became so burdened with debt that it could not be paid out of the movable property possessed, then a piece of the church's immovable property was to be given to the creditor in security. The purpose was to allow the property to work out the payment of the debt, both in the rate of interest—not more than four per cent—and in the revenues and fruits the creditor collected and reaped from the property.

[17] *Cod.*, I, 2, 14.

[18] "Annonae civiles" (*Cod.*, I, 2, 14, pr.), sometimes referred to as "panes civiles" or "panes gradiles" from the custom of the Byzantine emperors to give out a dole on the palace steps. *Cf.* Gothofredus, *Notae in Cod. Theod.*, V, 265 ff.; *cf. Cod. Theod.*, XIV, 17; *Cod.*, XI, 25.

[19] *Nov.*, VII, 1; *Nov.*, CXX, 1; *Cod.*, I, 2, 14, pr.; *Cod.*, I, 2, 17, 1.

[20] *Cod.*, I, 2, 14, pr.; *Nov.*, VII, Epilogue; *Nov.*, VII, 1; *Nov.*, CXX, 1.

[21] *Nov.*, CXXX, 13.

[22] *Nov.*, VII, 1; *Nov.*, CXX, 6, 7.

However, if the creditor did not wish to accept payment of the debt in this manner, the church could auction some of its immovable property in order to raise the money necessary. Many steps were required in this process. The administrator of the property in debt was obliged to draw up public instruments before the ecclesiastical Superior from whom he held his authority, attesting to the fact that a debt existed and could not be met out of the movable property available. The document was to be confirmed by his oath and the consent of the majority of the parties interested, namely, those dependent on the particular church, hospital, etc. The ecclesiastical Superior, if he was in favor of the proposed sale, signed the document and made it positively known that he consented to an auction. The administrator was to proclaim the auction for twenty days in advance by means of a written announcement posted in a public place.

In the event that no buyer was found at auction, the piece or pieces of immovable property offered for sale could be given to the creditor in the quantity necessary for acquittal of the debt. The value assessed on the property was to be just and equitable, and the creditor came into full and complete possession. The consent of the same administrator and interested parties was necessary before the transaction could be closed.[23]

In the case where there was no movable property of any kind out of which a creditor could be paid, then as a last resort in order to save the immovable property of the church from alienation, permission was granted to melt down and sell the sacred vessels and other ornaments necessary to divine worship. The legal formalities as stated above were to be observed, and the price obtained was to be used in paying the debt.[24]

These same formalities were likewise to be observed in the discharge of fiscal debts. When it was foreseen that there was not sufficient revenue to meet debts owed to the State, a meeting of all the ecclesiastical Superiors and clergy concerned was to be called. If, in this meeting, it was resolved that the only solution

[23] *Nov.*, CXX, 6, 2.

[24] *Nov.*, CXX, 10.

was through alienating immovable property, the decision to alienate, together with the consent of the major part of the clergy concerned, was to be handed down in due form and recorded with the judge of the province. To avoid any possibility of fraud, it was warned not to simulate fiscal debts in order to dispose of immovable property. Good faith was assured by the requirement that all proceedings were to take place on the word of the Gospels. Oaths were taken to the effect that there was no treason, favoritism or fraud involved, and that the purpose of the alienation was to protect the immunity of the Church.[25]

Exchange of property was permitted between churches, religious houses, and monasteries, provided no detriment to the Church resulted. The consent of those in charge was required, the majority of the clergy attached assenting either publicly or in writing.[26] Likewise, property could be exchanged with the government if the Church suffered no loss,[27] but it was forbidden to do this fraudulently in order to transfer the property to other persons.[28] A lease of perpetual *emphyteusis* was permitted on buildings not worth repairing and yielding no income.[29] Churches could make contracts of perpetual *emphyteusis* with each other, excepting the principal church of Constantinople.[30]

The alienation of immovable property was permitted when no clause in the contract of donation forbade alienation.[31] Although the law forbade in express terms the selling, mortgaging or pledging, of any of the sacred vessels, vestments, and other articles neces-

[25] *Nov.*, XLVI, 1; *Nov.*, CXX, 7, 1.
[26] *Nov.*, CXX, 7.
[27] *Nov.*, VII, 2.
[28] *Nov.*, LV, 1.
[29] *Nov.*, CXX, 1 (2).
[30] *Nov.*, LV, 2.
[31] *Nov.*, CXX, 9. Special privileges were granted to the Church of Jerusalem for the alienation of its immovable property within the city, not only for the redemption of captives (*Nov.*, CXX, 9), but also in general (*Nov.*, XL). The Church of Mysia was granted permission to alienate lands, houses, and vineyards left to it not only for the redemption of captives but also for the maintenance of the poor, provided it was so stipulated in the donation (*Nov.*, LXV, 1).

sary for divine worship,[32] yet exception was made for the redemption of captives from the enemy,[33] because, as Justinian said, the souls of men are to be preferred to inanimate things.[34] There was a further provision on sacred vessels. If a church in debt had more vessels than its needs demanded and could not pay off indebtedness otherwise than by alienating immovable property, the superfluous vessels could either be offered intact to some other religious establishment which has none, with the permission of the proper authorities, or melted and sold.[35]

The penalties for the violation of these restrictions of Roman law on the alienation of church property were severe. Those set down by the Constitution of Leo were approved by Justinian.[36] The transgressor lost whatever he may have gained and any price or privilege (bribe) he may have given for the favor. The property was acquired for the profit and advantage of the church, along with its rents and accessories for the entire intermediate time. The property was not considered as having been purchased or sold. What was done contrary to the law was considered as not having been done at all.[37] The administrator involved in this illegal transfer was to be deprived of his office, and damages to the church were to be taken out of his property. If necessary, his heirs, descendants, and even his successor, were liable to an action at law.[38] Notaries to these contracts were to be punished with perpetual exile.[39] A judge with jurisdiction in such matters and confirming such deals, lost his office and property.[40] The same punishment for alienation of church property in an unlawful manner was to be inflicted on those who either pledged, sold, or melted for purposes of alienation, any of the sacred vessels.[41] Legal action

[32] *Cod.*, I, 2, 21.
[33] *Cod.*, I, 2, 21, 2; *Nov.*, VII, 8.
[34] *Cod.*, I, 2, 21, 2; *Nov.*, VII, 8.
[35] *Nov.*, CXX, 10.
[36] *Nov.*, VII, Preface.
[37] *Cod.*, I, 2, 14, 3, 4; *Nov.*, VII, 7; *Nov.*, CXX, 11.
[38] *Cod.*, I, 2, 14, 5.
[39] *Cod.*, I, 2, 14, 6; *Nov.*, VII, 7, 1.
[40] *Cod.*, I, 2, 14, 7; *Nov.*, VII, 7, 1.
[41] *Nov.*, VII, 8.

could be had for restitution even in the case of vessels melted down.[42]

Where Leo only prescribed penalties for the unlawful sale of church property, Justinian also penalized in the same manner: unlawful donation, exchange, perpetual lease of *emphyteusis,* and giving of church belongings in security. This was universally applicable; it included all categories of ecclesiastics.[43]

The provisions of Roman law regarding restrictions on the alienation of all church property, especially against allowing it to get into the hands of lay persons, definitely served as a basis for the future development of Church Law. The limitations contained in chapter one of the Seventh Novel of Justinian, and the penalties of the "Leonine Constitution" are referred to and reaffirmed seven centuries later in the Decretals of Pope Gregory IX.[44]

[42] *Cod.,* I, 2, 21, 1.

[43] *Nov.,* VII, 5.

[44] C. 5, X, *de rebus ecclesiae alienandis vel non,* III, 13 (a. 1234): "Nulli liceat alienare rem immobilem ecclesiae suae, sive agrum, sive rusticum manicipium, neque specialis hypothecae titulo obligare. Alienationis autem verbum continet conditionem, donationem, venditionem, permutationem et emphyteusis perpetuum contractum. Unde omnes sacerdotes ab huiusmodi alienatione abstineant, poenas timentes quas Leonina constitutio comminatur." Compare with Nov., VII, 1 (a. 544): " . . . [neminem] licentiam habere alienare rem immobilem aut in domibus aut in agris aut in hortis aut omnino in huiusmodi, neque rusticum mancipium, neque civilem annonem, nec per specialis pignoris occasionem tradere creditoribus. Alienationis autem nomen generalius ideo posuimus, ut prohibeamus et venditionem, et donationem, et commutationem et in perpetuum extensam emphyteosin quae non procul ab alienatione consistit. Sed omnes ubique sacerdotes ab huiusmodi alienatione prohibemus, poenis subditos quibus Leonis piae memoriae usa est constitutio." See also: *Capitula* of Frankish Kings, auct. Ansegisus, Abbot of Fontanelle in Normandy, lib. II, c. 29 (a. 827, confirmed, a. 829)—*M. P. L.,* XCVII, 545 (483); *Capitularum Collectio Benedicti Diaconi* (spurious), *ca.* 830, Additio III, c. 56—*M. P. L.,* XCVII, 878; Conc. Oecum. Constantinop. IV, (a. 869), c. 15—Mansi, XVI, 168; Hardouin, V, 905; Regino, Abbot of Prüm, *De Ecclesiasticis Disciplinis* (a. 915), lib. I, c. 360—*M. P. L.,* CXXXII, 261; Burchard, Bishop of Worms, *Decretum,* a. (1021, 1022), lib. III, c. 164—*M. P. L.,* CXL, 706; Ivo, Bishop of Chartres, *Decretum* (*ca.* 1100), lib. III, c. 183—*M. P. L.,* CLXI, 241.

CHAPTER III

HISTORICAL SYNOPSIS

Alienation in Early Church Law

Church property and the offerings of the faithful were considered by the early Church as something offered to God and therefore sacred. Their wanton alienation was looked upon as a sacrilege. Appealing to the words of the prophet, "He that stealeth anything from his father or his mother and sayeth 'this is no sin' is a partner of a murderer," [1] Pope Lucius I argues that our Father is God who created us, and our mother is the Church who spiritualllly regenerated us in the sacrament of baptism. Therefore, he who unlawfully alienates the belongings of the Church and those consenting to this wrong are considered to have committed murder in the eyes of a just Judge.[2] The attitude of the Church from the earliest times may be said to find its basis in the Mosiac Law: [3] "Anything that is devoted to the Lord whether it be man or beast or field, shall not be sold, neither may it be redeemed." The Church reserved some of her most scathing denunciations and severest punishments for those who sought to despoil her of her patrimony.[4]

No cleric, whatever his rank or dignity, was to consider as his own those goods of the Church dedicated to God and committed to his care, but was rather to administer them according to the wishes of the Church. The poor and needy had to be taken care of, and

[1] Prov., XXVIII, 24.

[2] Decretum VI, Pp. Lucius I, a. 253—Hardouin, I, 139, 140.

[3] Levit. XXVII, 28.

[4] *Cf.* Council of Paris, VI (829, lib. I, c. 15: " . . . [diripiunt] possessiunculas ecclesiae et ea quae in Dei donaria conferuntur vertentes in lucrum suum, ut non habeant pauperes quod mane comedeant, qui quasi in nocte et nullo evidente populantur et cum luporum more cuncta diripiunt ne parvos quidem cibos indigentibus derelinquant"—Mansi, XIV, 550; Council of Nice, II (787), c. 13: " . . . qui sint condemnati a Patre et Filio et Spiritu Sancto, et ponantur ubi vermis eorum non moritur nec ignis extinguitur: quia voci Domini adversantur quae dicit: *Ne facite donum Patris mei domum negotiationis*"—Mansi XIII, 753.

in the first days of the Church they were the only legitimate cause for the distribution of the Church's property. The bishop was considered the custodian of the "common purse" of the free-will offerings of the faithful and the things dedicated to God. His conscience was his guide in its disbursement.[5] St. Paul repeatedly expressed his solicitude for the poor and even collected funds to alleviate their condition.[6] Wherever the Church went, she held out a helping hand to the poor, the enslaved and the unfortunate.[7] Each Christian community did all in its power to support its needy and aimed to aid the younger and poorer communities by benefactions.[8] No one was excluded from the charity of the Church. Widows, orphans, exiles, captives, prisoners, lepers, the sick, the plague-stricken, strangers, and travelers were the recipients of these alms.[9] Upon the shoulders of the Church fell the task of supporting the great throngs of needy inhabitants in a disintegrating Empire.[10]

From the very beginning, however, alienations had been frowned upon by the Church and closely controlled by Canon Law. Yet they were always permitted for just cause such as the urgent necessity of the faithful in time of famine, pestilence and war. She never hesitated to sell sacred vessels and vestments to succor the misfortunes of her children. The bishop was competent to authorize these alienations upon the advice of his consultors.[11]

[5] *Cf.* infra: Canon 25, Council of Antioch (341)—Hardouin, I, 604; Council of Paris, VI (829), lib. I, can. 15: "Quod nulli sacerdotum liceat res Deo dicatos sibique commissos, utpote proprias tractare et ad multifarios secundum libitum suum . . . usus retorquere, sed potius secundum canonicam auctoritatem sanctorumque patrum dicta et exemplo administrare vel dispensare"—Mansi, XIV, 549.

[6] Rom. xv, 26; Acts xi. 29; I Cor. xvi, 1-3.

[7] Tertullian, *Apologia,* cap. 39—*M. P. L.,* I, 532.

[8] Eusebius, *Historia Ecclesiastica,* IV, 23—*M. P. G.,* XX, 367.

[9] St. Coelestin, "Epistola XXIII ad Theodosium"—*M. P. L.,* I, 546; St. Justin, *Apologia,* I, 67—*M. P. G.,* VI, 430; St. Cyprian, "Epistola XXXVI"—*M. P. L.,* IV, 327; Tertullianus, *Apologia,* cap. 36—*M. P. L.,* I, 532; St. Hieronymus, "Epistola LXVI," cap. 55—*M. P. L.,* XXII, 641; etc.

[10] Uhlhorn, *Christian Charity in the Ancient Church,* p. 158.

[11] Wernz, *Jus Decretalium,* III, 134; Rivet, *Institutiones Juris Ecclesiastici privati,* II, n. 4; Fourneret, *Dictionnaire de Théologie Catholique,* v. "Biens ecclésiastiques"; A. Couly, *Dictionnaire de Droit Canonique,* v. "Alienation."

There seems to exist no conciliar legislation before the fourth century directly concerning the alienation of church property. However, this statement can only be made conditionally, because of the sparse remains of the many councils that certainly took place in the second and third centuries.[12] The Council of Ancyra in the year 314 legislated that in the absence of the bishop or during the vacancy of the Episcopal See no priest shall presume to sell the property of the Church. The contract was to be rescinded and the alienated property recalled.[13] In the year 341, the Council of Antioch formulated the fundamental principle of the power of a bishop to distribute in a Christlike manner Church belongings to all who were in need.[14] The council admonishes the bishops that it has the power to punish if in these distributions any fraud is found to work injury to the Church, such as giving to friends, relatives, or servants, unless they be among the needy.

However, it remained for the Church of Africa, at the end of the fourth century, to bring new life into the law by the introduction of several constructive ideas. The Council of Hippo in the year 393 forbade priests to sell their parochial property without the knowledge of the bishop. The matter of whether the bishop's consent was needed is still left in doubt. The contribution of this council is that the bishop's faculty to alienate depended on the knowledge of the council and of his priests.[15] In the fifth Council of Carthage, held in 401, legislation was enacted which considered the case where a bishop in an urgent necessity, when his funds did

[12] Hefele-Leclerc, *Histoire des Conciles,* I, 159, n. 4.

[13] Canon 14 (versio Dionys. Exig.): "De his qui pertinent ad ecclesiam, quaecumque, cum non esset episcopus, presbyteri vendiderint, placuit, rescisso contractu, ad jura ecclesiastica revocari"—Hardouin, I, 278; Mansi, II, 525; Kirch, *Enchiridion,* n. 225; *cf.* Cicognani, *Canon Law,* p. 175, n. 4.

[14] Council of Antioch, can. 25: "Episcopus ecclesiasticarum rerum habeat potestatem ad dispensandum erga omnes qui indigent, cum summa reverentia et timore Dei"—Hardouin, I, 604; Mansi, II, 1327, 1328; Bartholi, *Institutiones Juris Canonici,* p. 308.

[15] Council of Hippo, I (cit. in Cod. Can. Eccles. Afr., Canon 33): "Placuit ut presbyteri non vendant rem ecclesiae ubi sunt constituti, nescientibus episcopis suis, quomodo et episcopis non licet vendere praedia ecclesiae ignorante Concilio vel presbyteris suis"—Hardouin, I, 879; Bartholi, *Institutiones Juris Canonici,* p. 324.

not suffice, would be obliged to consider selling the property of the Church. The council first reiterated the common law that church property was not to be sold, indicating that the dispositions that followed were an exception. In the case considered, the bishop was to consult his archbishop (metropolitan), and together with a given number of bishops, the question of whether the alienation was necessary or not, was to be decided. If, however, the necessity was deemed so urgent that it could not wait for this consultation, the bishop could proceed to the alienation after having called in a few neighboring bishops as witnesses. However, these reasons which he considered so necessary must be sent in to the council as soon as possible, and he must be ready to defend them. Compliance with this rule was absolutely necessary, for the bishop who failed to heed it was judged as a culprit before God and a thief before the council, and deprived of his bishopric.[16] This canon is a rather definite improvement on the very general canon of the Council of Hippo. It adds the important feature, that an urgent necessity may be considered a just cause for alienation. Equally important, is the concept of the necessity of a consultation before alienating which later developed into a consultation with the cathedral chapter or diocesan consultors.

The canons of the African councils were later embodied in the "Code of Canons of the African Church,"[17] and from there found their way into the general practice of the Church through the Dionysian and Trullan collections.[18]

[16] Can. 4: "Placuit . . . ut rem ecclesiae nemo vendat. Quod si redditus non habet et aliqua nimia necessitas cogit, hoc insinuandum esse primati provinciae ipsius ut cum statuto numero episcoporum utrum faciendum sit arbitretur. Quod si tanta urget necessitas ecclesiae ut non possit ante consulere, saltem vicinos testes convocet episcopos, curans ad concilium omnes referre suae ecclesiae necessitates; quodsi non fecerit, reus Deo et concilio venditor, honore amisso, teneatur"—Hardouin, I, 987; Mansi, III, 969 (cit. in *Cod. Can. Eccles. Afr.,* Canon 26—Hardouin, I, 878); Bartholi, *Institutiones Juris Canonici,* pp. 338, 339.

[17] An. 419 (the Seventeenth Council of Carthage; Cicognani, *Canon Law,* 213), Hefele-Leclerc, *Histoire des Conciles,* II, 103, n. 2.

[18] Sixth and seventh centuries; Cicognani, *op. cit.,* p. 213; Maassen, *Geschichte der Quellen,* I, 10 ff.

To what extent did the canons of the Councils of Ancyra and Antioch become the universal law of the Church? There can be no question that they were known throughout the Church not long after the beginning of the fifth century. Canon 25 of the Council of Antioch found its way, somewhat modified as to the wording, into the collection known as the "Canons of the Apostles," collected somewhere about the year 400,[19] and received very favorably throughout the Orient. The canons of the Councils of Ancyra and Antioch found their way into the Occident through the collection known as the *Itala,* or *Prisca,* a Latin translation of the canons of the most orthodox Oriental councils, composed during the fifth century.[20]

The concept of alienation was as yet, however, very much unexplored. All it included was the contract of sale. Some years later, in 447, Pope Leo the Great in his letter to all the bishops of Sicily, warned them that not only are they not to sell the church property, but exchange and donation of it are also forbidden. A new exception to the general principle was also introduced. The bishops could undertake the alienation if it was seen that it would be for the advantage of the Church. However, in order to anticipate the possibility of any abuse of this exception allowed, the bishop was not permitted to alienate before having talked it over with all the clergy of his diocese and obtained their consent.[21] The importance of this decree of Pope Leo may be judged by the fact that it later appears in substance as Canon 32 of the "Ancient

[19] *Canones Apostolorum,* Canon 39: "Omnium negotiorum ecclesiasticorum curam episcopus habeat et ea velut Deo contemplante dispenset, nec ei liceat ex his aliquid omnino contingere, aut parentibus propriis quae Dei sunt condonare. Quod si pauperes sunt, tamquam pauperibus subministret, nec eorum occasione ecclesiae negotia depraedetur"—Hardouin, I, 37; Kirch, *Enchiridion,* 408, 409; Beverege, *Codex Canonum,* 445, 446; *M. P. L.,* LXVII, 146; Maassen, *op. cit.,* I, 408; Hefele-Leclerc, *op. cit.,* I, 1209.

[20] Maassen, *op. cit.,* I, 87; Council of Ancyra, Canon 14—*M. P. L.,* LVI, 751; Council of Antioch, Canon 25—*M. P. L.,* LVI, 800.

[21] "Sine exceptione decernimus ut ne quis episcopus de ecclesiae suae rebus audeat quidquam, vel donare, vel commutare, vel vendere; nisi forte ita aliquid horum faciat ut meliora prospiciat et cum totius cleri tractatu atque consensu id eligat"—Ep. XVII—*M. P. L.,* LIV, 705, 706; Maassen, *op. cit.,* I, 260.

Statutes of the Church," [22] and due to the great repute enjoyed by this collection, was adopted by many councils throughout Gaul as their own. It was subsequently embodied in the important canonical collections down to the time of Gratian.

This same letter of Pope Leo also ushered in an era of stricter penalties attached to the violation of the laws against alienation. Any cleric, he decreed, whether he was a deacon or a priest, who knowingly caused harm to the Church by alienation was to be deprived of orders and excommunicated. No penalty was mentioned where a bishop was involved. About twenty years later, this same principle was extended to all the bishops of the different provinces of Gaul by Pope Hilary.[23]

Until this time, the legislation against the alienation of church property consisted of a few lone regulations scattered here and there among the bulk of church law. However, in 502 matters came to a head at Rome during the pontificate of Pope Symmachus. His clergy had accused him of dissipating the church goods, and he answered by convoking a special synod to consider solely the question of the preservation of church property.[24] It was mostly local in scope, but its importance lay in the precisions it brought into the law. Distinction was made between "perpetual" alienation and giving in usufruct. Both were forbidden, but if the latter had already taken place it was permitted to exist, provided it were for the benefit of clerics, captives, and pilgrims. The property still belonged to the See of Rome.[25] The conception of what was meant

[22] *Statuta Ecclesiae Antiqua,* Canon 32—Hardouin, I, 981; Mansi, III, 954. The canon of Pope Leo has been somewhat modified in the process it is true, but there can be no doubt as to its parentage in relation to Canon 32 of the "Canons of the Apostles." (For a detailed discussion on the origins of this ancient collection see Hefele-Leclerc, *Histoire des Conciles,* II, 102, 103.) See Maassen, *op. cit.,* I, 393.

[23] Ep. VIII, 5 (461-467)—*M. P. L.,* LVIII, 27.

[24] Synod of Rome, III (502)—Hefele-Leclerc, *op. cit.,* II, 956; Maassen, *Geschichte der Quellen,* I, 286.

[25] Can. 4: "Sancimus ut nulli Apostolicae Sedis praesuli sub perpetua alienatione vel communicatione ad cuiuslibet jura transferre . . . nec in usufructuario jure . . . dare liceat, nec data retinere praeter clericos, et captivos, atque peregrinos"—Hardouin, II, 979; Mansi, VIII, 267.

by church property was broadened by the prohibition to alienate benefices.[26] A notable exception was introduced. Buildings in the city where the upkeep was quite costly, could be exchanged provided the transaction was not prejudicial to the Church.[27] Also the legal value of these contracts of alienation harmful to the Church was finally decided. They were considered as null and void from the beginning, as though no contract had ever been made.[28] Besides loss of office for the violator of these laws, those cooperating were declared anathema.[29]

The canons of this Council of Rome were not slow in finding their way into the general legislation of the Church in the West. A law of the Emperor Theodoric in 507 [30] directed them against priests who sold or gave outright the substance of the Church. A letter of Pope Symmachus to Bishop Caesarius of Arles in Gaul in the same year of the council, (502) applied Canon 4 of the council to the Church of Arles.[31] Another letter of Pope Agapetus I in 535 to Caesarius reaffirmed the binding force of this canon.[32] About this time, the Church of Arles under this same Bishop Caesarius is commonly admitted to have been instrumental in compiling the collection known as the "Ancient Statutes of the Church" [33] which contained the fundamental Canon 32, a combination of the principles of Pope Leo the Great prohibiting the selling, giving, or exchanging of church property without the con-

[26] Can. 6—Hardouin, II, 980; Mansi, VIII, 267.

[27] Can. 5: "Domus in quibuslibet urbibus constitutae, quarum statum necesse est expensa non modica sustentare, acceptis . . . sub justa existimatione redditibus . . . commutentur"—Hardouin, II, 980; Mansi, VIII, 267.

[28] Can. 8: "Documentum . . . quamvis ab initio nullum habuerint"—Hardouin, II, 980; Mansi, VIII, 268.

[29] Canons 6, 7—Hardouin, II, 980; Mansi, VIII, 268.

[30] Hardouin, II, 963.

[31] Pope Symmachus, Ep. VI, 1—Thiel, *Epistolae RR.PP. Genuinae,* I, 724; Hardouin, II, 956, 957; *M. P. L.,* LXII, 54; Maassen, *Geschichte der Quellen,* I, 287.

[32] Pope Agapetus I, Ep. VI—*M. P. L.,* LXVI, 46; Maassen, *Geschichte der Quellen,* I, 297.

[33] Cicognani, *Canon Law,* 222; Hefele-Leclerc, *Histoire des Conciles,* II, 102-108; Duchesne, *Les Fastes Episcopaux de l'Ancienne Gaule,* t. I, p. 141, cit. by P. Séjourné, *St. Isidore de Séville,* p. 265.

sent of the diocesan clergy, and those of Pope Symmachus, declaring that such contracts detrimental to the Church and in violation of the law were null and void.[34]

The complete diffusion of the legislation up to this time was, however, the work of the collections of Dionysius Exiguus. His fourth and most complete collection of the authentic church legislation up to his time,[35] contained the Canon 14 of the Council of Ancyra, Canon 25 of the Council of Antioch, Canons 26 and 33 of the Code of Canons of the African Church and the Canons of the third Synod of Rome under Pope Symmachus,[36] as cited above. This collection was especially well known in Rome and throughout Italy, but was also widely diffused through Spain, Africa, France, England and Ireland.[37]

Two important synods were held in Gaul about this time: the Councils of Agde in Languedoc, in 506, an Epaon in Burgundy, in 517. Of these the Council of Agde appears to have had the most effect upon subsequent Church law concerning alienation. Canons seven and twenty-two have the purpose of summing up and reaffirming all the previous law.[38] Sacred vessels were mentioned for

[34] *Statuta Ecclesiae Antiqua,* Canon 32: "Irrita erit donatio episcoporum, vel venditio, vel commutatio rei ecclesiasticae absque conniventia et subscriptione clericorum"—Hardouin, I, 981; Mansi, III, 954; *Cf.* Maassen, *Geschichte der Quellen,* I, 382.

[35] Can. 520—Cicognani, *Canon Law,* 216, Maassen, *Geschichte der Quellen,* I, 428.

[36] *M. P. L.,* LXVII, 330. *Codex Canonum Universae Ecclesiae,* cc. 35, 104—*M. P. L.,* LXXVII, 52, 68; *Codex Canonum Ecclesiasticorum,* cc. 34, 103, 26, 33—*M. P. L.,* LXVII, 154, 156, 191, 192.

[37] Cicognani, *Canon Law,* p. 216.

[38] Council of Agde, Canons 7, 22—Mansi, VIII, 325, 328; Hardouin, II, 998, 1000. In particular, Canon 7: "Casellas vero vel mancipiola Ecclesiae Episcopi, sicut prisca canonum praecipit auctoritas, vel vasa ministerii quasi commendata, fideli proposito integro Ecclesiae jure possideant; id est, ut neque vendere, neque per quoscumque contractus res unde pauperes vivunt, alienare praesumant. Quod si neccesitas certa compulerit, ut pro Ecclesia aut necessitate, aut utilitate, vel in usufructu vel in directa venditione aliquid distrahatur, apud duos vel tres comprovinciales vel vicinos, Episcopus, causa qua necesse sit vendi, primitus comprobetur: et habita discussione sacerdotali eorum subscriptione, quae facta fuerit, venditio roboretur. Aliter facta venditio vel transactio non valebit."

the first time in Canon 7; the penalties of loss of benefice and excommunication were contained in Canon 22. Canon 45, however, introduced an entirely new principle. In a case of necessity, a bishop could, without seeking the advice of his priests, alienate church property which was of little value and situated at an inconvenient distance.[39] Canon 49, the next canon concerning this subject is a puzzle. It begins along the same lines as Canon 22, legislating, however, against the urban and diocesan clergy. But, for approximately the same delicts, this time no excommunication is mentioned as a penalty, simply loss of office. While there may not be an actual contradiction between the canons here, still the latter canon does not seem to belong in this place.[40]

The Council of Epaon continued the work begun by the Council of Agde. Besides the traditional limitations already imposed upon alienation in the common law: the nullity of illegal contracts of alienation (Canon 7), the recalling of the property to the Church in this case (Canon 8), and the prohibitions against the alienations

[39] Council of Agde, Canon 45: "Terrulas aut vineolas exiguas et ecclesiae minus utiles, aut longe positas parvas, episcopus sine concilio fratrum, si necessitas fuerit, distrahendi habeat potestatem"—Mansi, VIII, 332; Hardouin, II, 1002.

[40] In fact, in a note to this effect in his edition of the councils, Hardouin (II, 1003) remarks that while Gratian and the canonical collections that precede him attribute this canon and those that follow in the editions, as belonging to the Council of Agde, yet before him are three very ancient manuscripts which attribute all the canons ascribed to the Council of Agde following Canon 47, with the exception of the last, as really belonging to the Council of Epaon. Canon 49, however, cannot be found among those of the Council of Epaon, yet it is found verbatim as a part of Canon 31 in the Codex Barberinus of the "Statuta Ecclesiae Antiqua" (Hardouin, I, 981; cit. as Council of Carthage, IV, 398). This may not sufficiently explain the origin of this canon known as 49 of the Council of Agde, but it does cast a serious doubt upon the validity of its place among the canons of that council. . . . The subsequent canons of these two councils need to be rearranged as follows: Canon 53 of the Council of Agde (Mansi, VIII, 333; Hardouin, II, 1004) is Canon 7 of the Council of Epaon (Mansi, VII, 560; Hardouin, II, 1048) *cf.* Berardi, *Gratiani Canones Genuini*, I, 243; Canon 56 of the Council of Agde (Mansi, VIII, 334; Hardouin, II, 1004) is Canon 8 of the Council of Epaon (Mansi, VIII, 560; Hardouin, II, 1048); Canon 12 of the Council of Epaon (Mansi, VIII, 560; Hardouin, II, 1049), is proper to that council.

made by bishops without the knowledge of the metropolitan (Canon 12), this council contained a new contribution, that of permitting the useful exchange of church property.[41] This was an extension of the permission of Pope Symmachus some years before.[42]

The influence of these councils on later church law on this subject in Gaul is witnessed by the several councils that followed shortly, reaffirming these principles: the third Council of Orleans in 538, which mentioned specifically fields belonging to the Church,[43] as being included in the laws prohibiting alienation, the fourth Council of Orleans, three years later, which added that those who have legally given any fields or vineyards as offerings to the Church could not subsequently alienate these, even if this contract was not in writing, nor can their heirs, under pain of excommunication.[44] The principles of Roman law affirmed as Canon Law by Pope Gregory the Great (*cf. supra*), that the sacred vessels may be sold for the redemption of captives, was recognized by the Council of Rheims at the beginning of the seventh century.[45]

Following the fifth Council of Carthage, no more councils dealt with this same subject in the African Church. All that remains of what the practice must have been there, beyond the contributions at the end of the fourth century and the beginning of the fifth, are two canonical collections embodying the early canons of the African

[41] Canon 12: "Utili tamen omnibus commutatione permissa"—Mansi, VIII, 560; Hardouin, II, 1049.

[42] Council of Rome, III (502), Canon 5—Hardouin, II, 980; Mansi, VIII, 267.

[43] *Cf.* Council of Orleans, III, (538), cc. 12, 22, 23—Mansi, IX, 15, 18; Hardouin, II, 1425, 1427.

[44] Can. 19—Mansi, IX, 116; Hardouin, II, 1438; Hefele-Leclerc, *Histoire des Conciles*, II, 1168; see also: Council of Orleans, V (549), Canon 13—Mansi, IV, 131. Council of Lyons, II (567) (Hefele-Leclerc, *op. cit.*, III, 182), Canon 5—Hardouin, III, 355; Mansi, IX, 788; Council of Narbonne (589) (Hefele-Leclerc, *op. cit.*, III, 288, 289), Canon 8—Hardouin, III, 493; Mansi, IX, 1016; and Council of Rheims (624, 625) (Hefele-Leclerc, *op. cit.*, III, 261), Canon 21—Hardouin, III, 574; Mansi, X, 597, which repress abuses in these matters.

[45] An. 624, 625 (Hefele-Leclerc, *Histoire des Conciles*, III, 261); Canon 22—Hardouin, III, 574; Mansi, X, 597; Hefele-Leclerc, *op. cit.*, III, 263.

Church. The first is the collection of Fulgentius Ferrandus, a deacon of the Church of Carthage, compiled around the year 546, containing abbreviations of Canon 14 of the Council of Ancyra, Canon 25 of the Council of Antioch, and Canon 4 of the fifth Carthaginian Council.[46] The other collection is that of Bishop Cresconius, around the year 690, also an abbreviation of the Canon of Ancyra with Canon 32 of the "Ancient Statutes of the Church" and Canon 39 of the "Canons of the Apostles." [47]

Bishop Martin of Braga in his collection of canons from the well-known early church councils was the first to introduce into Spain this particular part of the church law. He compiled his collection about the middle of the sixth century.[48] It contained among its canons an adaptation of Canon 14 of the Council of Ancyra,[49] Canon 25 of the Council of Antioch,[50] and another canon with elements of more than one early council, but phrased in his own words.[51] These canons are important, not by the fact that they added anything new, but mainly because this collection of Bishop Martin passed into the *Collectio Hispana,* then into the Pseudo-Isidorian Decretals, and subsequently into almost all the methodical collections.[52] The third Council of Toledo in 589, which marked the return of Spain to Catholicism from Arianism,[53] put into effect the general laws against alienations, but allowed those to take place which were useful and not detrimental to the

[46] *Brev. Can. Fulg. Ferr.,* Canons 36, 47, 95,—*M. P. L.,* LXVII, 951, 952, 954.

[47] *Brev. Can. Crisconii,* Canons 40, 97—*M. P. L.,* LXXXVIII, 858, 879.

[48] Ca. 536-580; the date cannot be determined more exactly. Cicognani, *Canon Law,* 218, and note 35; Maassen, *Geschichte der Quellen,* I, 802.

[49] *Capitula Martini Epis. Bracar.,* Canon 17: "Si quis presbyter aut diaconus inventus fuerit de ministris ecclesiae, ignorante concilio, aliquid vendidisse . . . sacrilegium commisit . . . "—Hardouin, III, 393.

[50] *Capitula Martini Episc. Bracar.,* Canon 16—Hardouin, III, 393.

[51] *Capitual Martini Episc. Bracar.,* Canon 14: "Si quis episcopus, nulla ecclesiastica ratione compulsa, inscio clero, aut ubi forte non est presbyter, de rebus ecclesiae aliquid praesumpserit vendere, res ipsas ecclesiae propriae restaurare cogatur . . . "—Hardouin, III, 393.

[52] Cicognani, *op. cit.,* 218; Maassen, *op. cit.,* I, 806.

[53] Hefele-Leclerc, *Histoire des Conciles,* III, 205, 223; Maassen, *op cit.,* I, 218.

Church, provided the consent of the clergy or the monks concerned was obtained, as well as those alienations intended to provide care for clerics, pilgrims, and the needy.[54] The general prohibition was again repeated in the ninth Council of Toledo in the middle of the next century.[55]

During the latter half of the seventh century, the whole of the eighth century, and even the beginning of the ninth, there appears to be a complete silence in particular conciliar legislation on this point. However, the last general councils held in the Orient fill up this gap. The councils referred to are the seventh Oecumenical Council, the second of Nice and the eighth Oecumenical Council, the fourth of Constantinople.

The seventh general council, the second of Nice, in 787, contained a canon to the effect that bishops were not to transfer into the hands of the civil powers, under penalty of invalidity of contract, the benefices or property on which their church depended for its support. Canon 39 of the "Canons of the Apostles" is cited by the council as the rule upon which these bishops shall base their conduct.[56] The eighth general council, the fourth of Constantinople, in the middle of the next century, forbade church property to be given even in *emphyteusis*. Rural possessions of the church were not to be sold, nor any of the sacred vessels, except for the reasons laid down in the Roman law of Justinian. Furthermore, if a bishop should build a monastery out of the church funds, this monastery was diocesan property. Deposition was decreed as the punishment for the violation of these laws, and those who willfully retained their illegally-gotten church property were declared anathema.[57]

The voluminous sixth Council of Paris, in 829, put into its law Canon 39 of the "Canons of the Apostles,"[58] calling special attention to the friends and relatives to whom the bishop is not to alien-

[54] Canon 3—Hardouin III, 480; Mansi, IX, 993.

[55] An. 655 (Hefele-Leclerc, *op. cit.*, III, 291), Canon 1—Hardouin, III, 973; Mansi, XI, 25; Maassen, *op. cit.*, I, 220.

[56] Canon 12—Mansi, XIII, 752; Hardouin, IV, 494.

[57] Canon 15—Mansi, XVI, 168, 169; Hardouin, V, 905.

[58] Canon 15, Lib. III—Mansi, XIV, 549; Hardouin, IV, 1307; Hefele-Leclerc, *Histoire des Conciles*, IV, 63.

ate church property.[59] Canon 25 of the Council of Antioch [60] and Canon 4 of the third Synod of Rome under Pope Symmachus,[61] also found a place in this council. The exchange of church property came under the special consideration of the Council of Meaux in 845, some years later. These contracts were only to be entered into with extreme caution and the most careful scrutiny, and those illicitly performed by any bishop, were to be rescinded—*emendentur*—by his successor.[62] This was good advice and became a very popular law as is seen by its place in the succeeding collections. The third Council of Valence adopted it ten years later.[63] The second Council of Soissons in 853, however, made the exchange of church property dependent on the permission of the king.[64] The above mentioned Council of Meaux also provided that any exchange of the church property made during the vacancy of the episcopal see was to be rescinded, by force if necessary.[65]

It was at this point in the history of church law that the famous Pseudo-Isidorian Decretals made their appearance in the Church of Gaul[66] Though the collection is far from faithful in many of its renditions, still much of it is genuine, and it is entitled to a debt of gratitude for keeping unbroken, on this subject at least, the chain of tradition in church law through its widespread popularity. It is far more comprehensive than any of the previous collections, and

[59] Canon 16, L. III, 1—Mansi, XIV, 550; Hardouin, IV, 1308; Hefele-Leclerc, *op. cit.*, IV, 63.

[60] Canon 15, L. III, 1—*Ibidem.*

[61] Canon 17, L. III—Mansi, XIV, 551; Hardouin, IV, 1309; Hefele-Leclerc, *op. cit.*, IV, 63.

[62] Canon 23 (Canon 7, Synod of Beauvais)—Mansi, XIV, 824; Hardouin, IV, 1487.

[63] An. 855 (Hefele-Leclerc, *op. cit.*, IV, 204), Canon 21—Hardouin, V, 94; Mansi, XV, 11.

[64] Canon 13—Mansi, XIV, 982; Hardouin, V, 44.

[65] Canon 21—Mansi, XIV, 823; Hardouin, IV, 1486. For England, see Council of Chelsea (816), Canon 7—Mansi, XV, 357; Hefele-Leclerc, *op. cit.*, IV, 8.

[66] Between 847 and 853: Hinschius, *Decretales Pseudo-Isidorianae,* p. cci; Cicognani, *Canon Law,* p. 224.

the canons it contains concerning this subject are rendered fairly accurately. Thus, a collection is had at this moment in Gaul, containing: Canon 14 of the Council of Antioch, Canon 32 of the *Statuta Ecclesiae Antiqua,* Canon 4 of the fifth Council of Carthage, Canons 7 and 22 of the Council of Agde, Canons 7 and 8 of the Council of Epaon, Canons 14 and 16 of the collection of Bishop Martin of Braga, Canon 3 of the third Council of Toledo, Canon 1 of the ninth Council of Toledo, the decree of Pope Symmachus to Bishop Caesarius of Arles, and the third Synod of Rome under Symmachus on the question of church property.[67]

A *Brevarium* inserted into a synod held at Rome in 853 under Pope Leo IV reminded bishops and priests of the canonical penalties they incur for alienating the substance of their benefices.[68] A council held at Mainz in 888 reaffirmed the prohibition to alienate the property or funds of churches, under pain of excommunication until restitution was made.[69]

Toward the middle of the next century, Bishop Atto of Verceil added that upon the death or expulsion of the bishop the diocesan administrators and others who had charge of the church property were not to alienate but rather keep it intact until the consecration of the new bishop. At the close of this century, Abbo, Abbot of Fleury, renewed in his "Collection of Canons" the Canons 14 and 16 of the collection of Bishop Martin of Braga.[70] At about the same time (998) the young emperor, Otto III, by a constitution [71] came to the aid of the Church to enforce the laws in general on the alienation of church property by force of arms, if necessary. Then in the middle of the next century, a lone Council of Tours tried to start afresh by decreeing that no bishop or prelate shall, with malice aforethought, sell, or give, in violation of the canons, any new fief

[67] Hinschius, *Decretales Pseudo-Isidorianae,* pp. 272, 304, 307, 332-335, 359-361, 397, 429, 657; *M. P. L.,* CXXX, 284, 345, 350, 400, 402, 406, 454, 521, 580, 991.

[68] Cap. ult.—Mansi, XIV, 1025; Hardouin, V, 83.

[69] Canon 6—Mansi, XVIII, 66; Hardouin, VI, 405; Hefele-Leclerc, *Histoire des Conciles,* IV, 690.

[70] Canon 41—*M. P. L.,* CXXXIX, 496.

[71] *Constitutio Ticinensis—M. P. L.,* CXXXVII, 855, 856.

of things belonging to the Church. If this happened, he was to make restitution or suffer the canonical punishment.[72]

During the tenth and eleventh centuries, while there was little or nothing in the way of conciliar legislation on alienation, the tradition of the church law, however, was kept alive by the succeeding canonical collections. Following the Pseudo-Isidorian Decretals, the best-known of these collections were those of Regino, Abbot of Prüm in the diocese of Trier, (Tréves, Germany), which came into being at about the end of the ninth century, Burchard, Bishop of Worms, in the first quarter of the eleventh century, and Bishop Ivo of Chartres, about the year 1100. Contained in these collections were such canons that concerned alienation as Canon 33 of the "Code of Canons of the African Church" [73] and Canon 6 of the third synod of Rome under Pope Symmachus. The latter canon acquired a few extra points, however, with the passing of the centuries. At the time it was first promulgated, it was a general precept to the effect that priests in the city of Rome were not to alienate any portion of their benefice. In the centuries that followed, it lost its local scope, took on a more universal one and became more specific. By the time it is found in these collections, it prohibited, as included in the notion of benefice, the alienation of any gold, silver, gems, and vestments, or movable property necessary for the service of the altar.[74] Canons 14 and 17 of the collection of Bishop Martin of Braga, and Canon 23 of the Council of Meaux were likewise included in these collections and warned that

[72] An. 1060 (Hefele-Leclerc, *Histoire des Conciles,* IV, 1202), Canon 3—Mansi, XIX, 927; Hardouin, VI, 1072; Hefele-Leclerc, *op. cit.,* IV, 1203.

[73] Regino of Prüm, *De Ecclesiasticis Disciplinis,* lib. I, Canon 347—*M. P. L.,* CXXXII, 259; Burchard of Worms, *Decretum,* lib. III, Canon 178—*M. P. L.,* CXL, 708; Ivo of Chartres, *Decretum,* pars. III, Canon 239—*M. P. L.,* CLXI, 254.

[74] Quicumque presbyter de jure tituli sui quolibet modo, aurum, argentum, vel vestes, vel gemmas quoque si sint, vel si accesserint aliqua mobilia adornamenta divina, aliquid in perpetuum alienare tentaverit . . . donator, alienator, ac venditor, honoris sui mulctetur amissione"—Regino of Prüm, lib. I, Canons 342, 345, 349—*M. P. L.,* CXXXII, 258, 259; Burchard of Worms, lib. III, Canons 178, 180, 181—*M. P. L.,* CXL, 708; Ivo of Chartres, *Decretum,* pars. III, Canons 240, 241, 242—*M. P. L.,* CLXI, 255.

the exchange of church property was to be made with extreme caution.[75] The collections are unanimous in containing the above canons. However, there are a number of other canons that were not contained in all three collections but in one or the other of them. The collections are far from complete, and the absence or presence of certain canons cannot be construed as an indication of their relative importance. Among these other canons are: Canon 32 of the *Statuta Ecclesiae Antiqua,*[76] Canon 26 of the "Code of Canons of the African Church," Canons 4 and 5 of the third Synod of Rome under Pope Symmachus, Canon 45 of the Council of Agde,[77] Canon 3 of the third Council of Toledo,[78] and Canon 21 of the Council of Meaux in 845, which forbids the exchange of church property during the vacancy of the episcopal see.[79]

The continuation of Roman law enactments in the Church law is evidenced by the condensation in the collections of this period of the "Leonine Constitution" of the year 470 and the Seventh Novel of Justinian. It forbade the alienation of immovable church property, such as houses and lands; church property was not to be burdened by a special mortgage; and the contracts of sale, donation, exchange and perpetual lease of *emphyteusis* were included within the meaning of alienation. The penalties contained in the same "Leonine Constitution" were invoked upon all ecclesiastics who violated the law.[80] However, according to the provision made by

[75] Regino of Prüm, lib. I, Canon 366—*M. P. L.,* CXXXII, 262; Burchard of Worms, lib. III, Canon 171—*M. P. L.,* CXL, 707; Ivo of Chartres, *Panormia,* lib. II, Canon 87—*M. P. L.,* CLXI, 1102; *Decretum,* lib. III, Canon 232—*M. P. L.,* CLXI, 253.

[76] Burchard of Worms, lib. III, Canon 170—*M. P. L.,* CXL, 706; Ivo of Chatres, *Panormia,* lib. II, Canon 86—*M. P. L.,* CLXI, 1101; *Decretum,* lib. III, Canon 231—*M. P. L.,* CLXI, 253.

[77] Regino of Prüm, lib. I, Canons 343, 344, 348, 351—*M. P. L.,* CXXXII, 258-260.

[78] Ivo of Chartres, *Panormia,* lib. II, Canon 85—*M. P. L.,* CLXI, 1101.

[79] Regino of Prüm, lib. I, Canon 362—*M. P. L.,* CXXXII, 262; Burchard of Worms, lib. III, Canon 166—*M. P. L.,* CXL, 706.

[80] *Cf. Cod.,* I, 2, 14; *Nov.* VII, 1; Regino of Prüm, lib. I, canon 360—*M. P. L.,* CXXXII, 261; Burchard of Worms, lib. III, Canon 164—*M. P. L.,* CXL, 706; Ivo of Chartres, *Decretum,* lib. III, Canon 183—*M. P. L.,* CLXI, 241;

the Roman law, the church could exchange property with the civil government in virtue of pragmatic sanction.[81] The principle that the right to alienate ecclesiastical property rested solely in the bishop was reaffirmed by the first general council to be held in the West, that of the first Lateran in 1123.[82] No cleric was permitted to alienate his own benefice or any ecclesiastical fief.[83]

The Laws of Alienation in Gratian and the Decretals

The Decretum of the Magister Gratianus had the merit of grouping into a more complete collection than had hitherto been made the conciliar legislation of the preceding ages concerning alienation. Besides canons of councils he also included letters of Popes, and the result was a revival in church law studies brought about by a better knowledge of the law.

Concerning alienation in particular, the ancient discipline of the Church was incorporated into the Decree of Gratian in the canons which permitted bishops to alienate ecclesiastical property of considerable value after consultation with their council, or with the whole *presbyterium* of their diocese, and property of inconsiderable value even without this formality. With the bishop lay the power of distributing the belongings of the Church as the need arose,[84] but his power was not to be used indiscriminately.[85] In fact, the power of the bishop was in many respects very restricted. He was enjoined from alienating very valuable real estate belonging to the

"Nulli liceat alienare rem immobilem Ecclesiae, sive domum, sive agrum, sive hortum, sive rusticum mancipium, neque creditoribus specialis hypothecae titulo obligare. Alienationis autem verbum continet 'conditionem' (venditionem), donationem, permutationem, et emphyteusis perpetuum contractum . . . omnes sacerdotes ab huiusmodi abstineant, poenas timentes quos Leonina Constitutio minatur." *Cf.* also: *Capitula of Ansegisus,* lib. II, cap. 29—*M. P. L.,* XCVII, 545 (483).

[81] *Cf. Nov.,* VII, 2; Regino of Prüm, lib. I, Canon 361—*M. P. L.,* CXXXII, 261; Burchard of Worms, lib. III, Canon 165—*M. P. L.,* CXL, 706.

[82] Council of Lateran, I, Canon 4—Hardouin, VI, 1111; Mansi, XXI, 282; Hefele-Leclerc, *Histoire des Conciles,* V, 630.

[83] Council of Lateran, I, Canon 22—Hardouin, VI, 1114; Mansi, XXI, 286.

[84] C. 7, C. X, q. 2; cc. 51, 53, C. XII, q. 2.

[85] C. 18, C. XII, q. 2.

church.[86] He was not to alienate by perpetual lease of *emphyteusis* any property upon which a church depended for its upkeep, nor sell any country estates, or otherwise place them in a worse condition than that in which he found them, whether the alienation were made to a prince of the nation or not.[87] Any such contract was null and void.[88] Property acquired by a bishop during the term of his episcopacy was not to be alienated by him and, likewise, property acquired by priests during the term of their office.[89]

If a necessity should arise, alienations could be transacted, provided the bishop consulted his counsellors and the clergy subject to him. Yet there must be no doubt, not only in the bishop's mind but in the mind of all his clergy, that this alienation, that is, sale, donation, or exchange, will be for the advantage of the Church.[90] In fact, if the bishop failed to comply with these solemnities, the alienation was to be considered as having no binding force.[91] In the case of donating one of his parochial churches to a monastery, the bishop could proceed on the consent of his consultors, and if he subsequently gave church property for the sustenance of this monastery, it was valid.[92]

Alienation was entirely permissible in the case of church buildings in cities where the upkeep was high,[93] and where it turned out that these buildings were more cumbersome than useful, even pastors could proceed to their alienation.[94] Following the ancient principle laid down by Justinian that the souls of men are to be preferred to inanimate objects, sacred vessels were permitted to be sold or otherwise alienated for the redemption of captives,[95] but

[86] C. 20, C. XII, q. 2.

[87] C. 13, C. XII, q. 2.

[88] C. 19, C. XII, q. 2.

[89] C. 12, C. XII, q. 2; c. 52, C. XII, q. 2 (Dictum Gratiani).

[90] C. 52, C. XII, q. 2.

[91] C. 52, C. XII, q. 2, par. 1 (Dictum Gratiani, cit. Canon 32—*Stat. Eccles. Antiq.*).

[92] C. 73, C. XII, q. 2.

[93] C. 20, C. XII, q. 2.

[94] C. 52, C. XII, q. 2 (Dictum Gratiani).

[95] C. 13, 14, C. XII, q. 2; c. 70, C. XII, q. 2 (Dictum Gratiani).

only in this case. Even church property in general came under this permission.[96]

During the vacancy of the episcopal see, all church property was to remain intact.[97] Under no circumstances, unless with special permission of the bishop, were priests or deacons, whether urban or diocesan clergy, or attached to some definite parish, to sell, give, or exchange church property.[98] Any attempt by clerics to alienate their allowances or benefice was invalid, and *a fortiori* attempts of intruders in the clerical state, illicitly ordained.[99]

The penalties were severe. Whoever presumed to alienate illicitly any property of the church, whether great or small, was to be deprived of his office, whether he was a bishop, priest, or deacon,[100] considered as a thief and robber,[101] and under anathema if an active cooperator [102] until restitution was made.[103] The penalties of excommunication,[104] and degradation,[105] were likewise decreed.

The fourth general council of the Lateran in the year 1215, undertook to clear up once and for all the troublesome question of lay intervention, amplifying Canon 4 of the first general council of the Lateran to the extent that no constitutions of the civil powers concerning the alienation of fiefs and other church possessions were to have any effect unless by consent of the ecclesiastical authorities concerned and with the consent of the council.[106]

Soon after this council, Pope Gregory IX promulgated his Decretals (1234). The basic definitions of Justinian in the *Corpus*

[96] C. 15, C. XII, q. 2.

[97] C. 8, C. X, q. 2; c. 42, C. XII, q. 2.

[98] Cc. 32, 35, 36, 51, C. XII, q. 2.

[99] C. 37, C. XII, q. 2.

[100] C. 1, C. XVII, q. 4.

[101] C. 8, C. XII, q. 2.

[102] C. 20, C. XII, q. 2.

[103] Cc. 20, 35, C. XII, q. 2.

[104] C. 32, C. XII, q. 2.

[105] C. 41, C. XII, q. 2.

[106] Canon 44—Hardouin, VII, 49; Mansi, XXII, 1027; Hefele-Leclerc, *Histoire des Conciles*, V, 1366, 1367; *cf.* Council of Lyons (1245), Canon 13—Mansi, XXIII, 622; Hefele-Leclerc, *op. cit.*, V, 1649.

Juris Civilis [107] were maintained, namely, that by alienation was meant sale, donation, exchange, or perpetual contract of *emphyteusis,* and that no one was to be allowed to alienate the immovable property of the church, whether buildings or land, or burden it with a special mortgage, under pain of the penalties of the "Leonine Constitution." [108] The bishop could not alienate the property of the *mensa episcopalis* or of the cathedral chapter. All illegal alienations were to be revoked.[109]

With the consent of the cathedral chapter, the bishop could alienate less useful possessions of the church for those more useful.[110] However, all alienations made without the proper consent were invalid [111] even though approved by constitutions of the civil authorities.[112] Tithes or offerings to the church could not be alienated to lay persons even by hereditary right,[113] and the prelate so doing was to be punished.[114]

Donations made by a bishop for a period of from fifty to a hundred years, and causing serious damage to the Church, could be legitimately revoked. Donations made for a longer period of time could not be made by any bishop except on the authorization of his ecclesiastical superior, even though the donation caused no damage to the Church.[115] A bishop could not give the property of one church to another nor exchange property between them without the consent of both.[116] Any exchange of church property made without due solemnity of law could be revoked by the successor in office.[117]

[107] *Cod.,* I, 2, 14; *Nov.* VII, 1.

[108] C. 5, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[109] C. 10, X, *de rebus ecclesiae alienandis vel non,* III, 13; Pope Innocent III, "Epistolae," lib. I, nn. 105, 106 (1198)—*M. P. L.,* CCXIV, 92, 93; Altessera, *Opera Omnia,* X, 560, 562.

[110] C. 8, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[111] C. 6, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[112] C. 12, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[113] C. 15, X, *de decimis,* III, 30.

[114] C. 17, X, *de decimis,* III, 30.

[115] C. 9, X, *de donationibus,* III, 24.

[116] C. 1, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[117] C. 2, X, *de reb. permut.,* III, 19.

More specifically, no priest was to attempt to give in pledge to lay persons for a debt he contracted, any of the sacred vessels, as chalices or patens or sacred vestments or church books, unless impelled by a most justifiable cause.[118] If a pastor should obligate his church as pledge for a loan, his heirs were to be compelled to redeem it and restore it. If the heirs refused, they were to be punished.[119] A prelate who mortgaged church property to pay off other debts was *ipso facto* suspended from the administration of both temporal and spiritual affairs.[120]

The consent of the cathedral chapter or diocesan consultors was necessary before the bishop could proceed to the sale, donation, or exchange of church property.[121] This was the logical development, due to the expansion of the church, from the original canons which required the consent of the clergy of the diocese in such cases. Without the consent of the chapter, the bishop could not hand over a church and its revenues to a monastery, even though the patron consented,[122] nor give vacant churches to other churches, though he himself held the *jus patronatus* over them.[123] A temporal alienation made without the consent of the chapter could be given a *sanation,* however, if they afterwards conented.[124]

The *Liber Sextus* of Boniface VIII contained a decretal to the effect that the perpetual alienation of church property without a just cause was invalid, even though the solemnities required by law were duly observed.[125]

At the beginning of the fourteenth century Pope Clement V in his collection of decretals, included a canon from the Council of Vienne to the effect that any cleric who alienated for life or even for a certain time, the possessions of his administration (monastery, priory, church, etc.), unless necessity or utility demanded or his

[118] C. 1, X. *de pignor.,* III, 21.
[119] C. 3, X, *de pignor.,* III, 21.
[120] C. 2, X, *de solutionibus* III, 23.
[121] C. 1, X, *de his quae fiunt a praelato sine consensu capituli,* III, 10.
[122] C. 9, X, *de his qui fiunt a praelato sine consensu capituli,* III, 10.
[123] C. 8, X, *de his qui fiunt a praelato sine consensu capituli,* III, 10.
[124] C. 3, X, *de his qui fiunt a praelato sine consensu capituli,* III, 10.
[125] C. 1, *de rebus ecclesiae alienandis vel non,* III, 9, in VI°.

superior consented, incurred a penalty of suspension from office, and the concession made was worthless.[126] A bishop could unite one church with another, or a church with a religious house, with the consent of the chapter, even though neither the rector of this church nor his defender (advocate) was consulted. However, it is not permissible for the bishop or the chapter to unite any church to the episcopal *mensa,* all contrary customs reproved.[127]

During the same period the prohibition against priests alienating church property without the special permission of the bishop, as well as bishops without the consent of the consultors, was the object of numerous councils in France. Priests of every rank and dignity were included in these canons. The church property in question included not only immovable property, such as houses, lands, gardens, vineyards, revenues, etc., necessary for the upkeep of the church, but also movable property, and especially the sacred vessels and vestments necessary for worship, and the church books. Penalties ranging from excommunication and censure to loss of benefice, were incurred for violation, and the contract was null and void.[128] Nor were the goods of the church [129] and especially the sacred vessels, to be given in pledge to pay off debts.[130] Furthermore, no church be-

[126] C. 1, *de rebus ecclesiae alienandis vel non,* III, 4, in Clem.

[127] C. 1, *de rebus ecclesiae alienandis vel non,* III, 4, in Clem.

[128] Synod of Nîmes (an. 1284, Hefele-Leclerc, *Histoire des Conciles,* VI, 293)—Hardouin, VII, 919; Council of Cognac (1238, Hefele-Leclerc, *op. cit.,* VI, 83), Canon 35—Hardouin, VII, 322; Mansi, XXIII, 495; Synod of Clermont (1268, Hefele-Leclerc, *op. cit.,* VI, 147), Canon 3, Pars II—Hardouin, VII, 606; Mansi, XXIII, 1205; Council of Avignon (1270, Hefele-Leclerc, *op. cit.,* 149), Canon 1—Hardouin, VII, 655; Mansi, XXIV, 16; Council of Avignon (1282, Hefele-Leclerc, *op. cit.,* VI, 288), Canon 3—Hardouin, VII, 880; Council of Avignon (1326, Hefele-Leclerc, *op. cit.,* VI, 801), Canon 51—Hardouin, VII, 1512; Mansi, XXV, 771; Hefele-Leclerc, *op. cit.,* VI, 806; Council of Arles (1275, Hefele-Leclerc, *op. cit.,* VI, 226), Canon 7—Hardouin, VII, 727; Mansi, XXIV, 148.

[129] Council of Nugarol (1303, Hefele-Leclerc, *op. cit.,* VI, 480), Canon 19—Hardouin, VII, 1264; Mansi, XXV, 116. (C. 18—Hefele-Leclerc, *op. cit.,* VI, 482.)

[130] Council of Arles (1275), Canon 7; Council of Clermont (1268), Canon 3, Pars II.

longings were to be given to one's relations except as to the poor.[131] Above all, the sacred relics were not to be sold.[132] Immovable ecclesiastical property acquired during an administratorship was to be left to the priest's own church, and the sacred utensils acquired or found when appointed were to be left to the successor.[133] In the case of less useful possessions, when for the utility of the benefice they were given in a perpetual lease of *emphyteusis,* the alienation was still valid if the solemnities had been omitted.[134] In the matter of mortgages, churches were not to be indebted beyond the amount of one hundred *solidi* (of Tours) without the special permission of the bishop. Otherwise the contract was not binding on the church unless the creditor granted the money manifestly for the utility of the church.[135] This is the first attempt at clearly defining the lines between the pastor's and the bishop's powers in the matter of mortgages. Finally, when any immovable properties of the church changed hands through alienation, express mention had to be made of the right of the churches over them.[136]

The church in England at this time was concerned mostly with a different side of the question. There was, in fact, an invalidating canon directed against the unlawful alienation of all immovable church property, whether by sale, donation, exchange, lease of perpetual *emphyteusis,* or pledge, by any cleric, whatever be his grade or eminence. Excommunication was threatened unless restitution was made.[137] Also it was absolutely forbidden to alienate churches or ecclesiastical benefices.[138] But the main plague seemed to be

[131] Council of Paris (1212-3, Hefele-Leclerc, *op. cit.,* V, 1308), Canon 13. Pars III—Hardouin, VI, 2013; Mansi, XXII, 837.

[132] Council of Bayeux (1300), Canon 40—Hardouin, VII, 1232; Mansi, XXV, 68.

[133] Synod of Clermont (1268), Canon 3, Pars II—Mansi, XXIII, 1205.

[134] Council of Avignon (1326), Canon 51—Hardouin, VII, 1512.

[135] Synod of Nîmes, Canon 1284—Hardouin, VII, 920.

[136] Council of Avignon (1337, Hefele-Leclerc, *Histoire des Conciles,* VI, 840), Canon 15—Hardouin, VII, 625, 626; Mansi, XXV, 1091.

[137] Synod of Exeter (1287, Hefele-Leclerc, *op. cit.,* VI, 307), Canon 26—Hardouin, VII, 1100; Mansi, XXIV, 814.

[138] Council of London (1127, Hefele-Leclerc, *op. cit.,* V, 667), Canon 1—Hardouin, VI, 1130; Mansi, XXI, 355.

the giving of church goods in pledge and then not bothering to redeem them. Therefore, the sacred vessels and church books were not to be given in pledge to any lay persons, whether Jews or Christians, much less were they to be sold. Church possessions were forbidden to be rented, given in fief, or alienated in any other manner except for reasons of urgent necessity and evident utility of the church. The consent of the bishop had to be obtained in every case. Otherwise, all contracts of alienation were void.[139] Belongings of the church were not to be left in pawn shops but must be redeemed, and by the heirs of the cleric, if necessary.[140]

The national Council of Würzburg which contained the law prevailing in the church of this period in Germany was busy repressing abuses. Although the alienation of church property and especially sacred vessels and the church records was forbidden by the canons, nevertheless the council learned that many prelates "by a new-found kind of alienation," transferred the title to the goods of the churches they governed, although weighted down with the gravest debts, to their relations or other persons, simulating it to be for the utility of their churches, and this for life or for holding in heavy mortgage, so that their successors dared not or could not redeem the property. Therefore, all those alienating through fraud without the consent of their superiors, otherwise than permitted by law, were to suffer the canonical punishment of excommunication.[141] Not only the above mentioned but all church advocates and others who unduly burdened church property with debt incurred the same penalty. Moreover, these contracts were declared invalid.[142] Whoever sold without the necessary consent the fiefs over which the

[139] Council of Lambeth (1330, Hefele-Leclerc, *op. cit.*, VI, 814), Canon 7—Hardouin, VII, 1554. Constitutions of Bishop Richard Poore (1217), caput 41—Hardouin, VII, 101; Mansi, XXII, 1121.

[140] Pope Alexander III to the Bishop of Exeter, a. 1179—Hardouin, VI, 1812.

[141] Council of Würzburg (1287, Hefele-Leclerc, *Histoire des Conciles,* VI, 307), Canon 9—Hardouin, VII, 1134, 1135; Mansi, XXIV, 854; Hefele-Leclerc, *op. cit.*, VI, 309.

[142] Synod of Cologne (1280, Hefele-Leclerc, *op. cit.*, VI, 258), Canon 12—Hardouin, VII, 831; Mansi, XXIV, 358; Hefele-Leclerc, *op. cit.*, VI, 263.

church or any ecclesiastic had full domain also incurred excommunication, and the fiefs were to be returned to the church.[143]

The same abuses prevailed in Austria. Since many prelates were selling or otherwise alienating church property with little justification or even renting this property for long periods of time and in a manner harmful to the welfare of the Church, in the future these alienations or rentings made without the consent of the bishop and that of the consultors of the church establishment receiving the property were void, and the alienator was to be punished with suspension until restitution was made.[144]

The great national Hungarian synod held at Ofen (Buda) in 1279 contained much valuable and specific legislation on this matter, and repressed abuses by severe punishments. No prelate, whether superior or inferior, was to alienate church property, either immovable or movable, especially *mobilia pretiosa,* unless for evident utility of the church, and with the assent of the representatives of the ecclesiastical establishment concerned.[145] Except in the cases permitted by law, immovable property was not to be alienated by inferior prelates without the special permission of the bishop, nor by the latter without that of the archbishop, nor by the metropolitans without the special permission of the Holy See. Otherwise, alienations were null and void, and restitution was to be made. The penalty for violation for inferior prelates was suspension from orders; for bishops and archbishops it was suspension from the use of pontificals.[146] Rectors of churches were not to donate for life or give in testament any movable property, as books or ornaments belonging to the church, except as permitted by law, under pain of invalidity of the transaction and obligation to restitution.[147] Movable property of the

[143] Council of Würzburg, Canon 31—Mansi, XXIV, 862; Hefele-Leclerc, *op. cit.,* VI, 312.

[144] Council of Salzburg (1281, Hefele-Leclerc, *op. cit.,* VI, 275), Canon 1—Hardouin, VII, 855, 856; Mansi, XXIV, 397.

[145] Council of Buda, Canon 29—Hardouin, VII, 799; Mansi, XXIV, 284; Hefele-Leclerc, *op. cit.,* VI, 251.

[146] Canon 36—Hardouin, VII, 801; Mansi, XXIV, 287; Hefele-Leclerc, *Histoires des Conciles,* VI, 351.

[147] Canon 30—Hardouin, VII, 799; Mansi, XXIV, 284; Hefele-Leclerc, *op. cit.,* VI, 251.

church edifice was not to be given in pledge for the payment of debts except with the permission of the bishop and on consultation with the parishioners.[148] The provisions of the council embraced all kinds of church property, all classes of persons, and every manner of alienation to come under these prohibitions.[149]

Abuses of alienation were reproved in Spain, whereby prelates and others administering church property gave it into the hands of lay persons, whether for a time or in perpetuity, for almost any reason.[150] Wherefore, no one, no matter what his state or condition, was to attempt to alienate church property in any manner. Such illegal contracts were declared null.[151]

The Council of Constance in 1418, which became an oecumenical council in its later sessions—sessions 41 to 45—defined in Canon 9 of its forty-third session, after reiterating the necessity of consent for validity of alienation, that the consent of the council, together with the subscription of a majority of the cardinals was necessary for the leasing of all vicariates, lands, cities, and dominions of the Roman Church beyond a period of five years.[152]

In summary, the ancient discipline of the Church was continued under the law of the decretals. The only difference was that the cathedral chapter had completely taken the place of the *presbyterium* of the diocesan clergy. It is true that a decree of the general Council of Lyons II in 1274, afterwards embodied in the Decretals of Boniface VIII, required the consent of the Holy See in order that ecclesiastical property might be placed under the power of lay persons; it is likewise true that the national Hungarian Synod

[148] Canon 29—*ibidem*.

[149] Canon 50—Hardouin, VII, 805; Mansi, XXIV, 293; Hefele-Leclerc, *op. cit.*, VI, 253.

[150] Council of Palencia, Province of Castille (1388, Hefele-Leclerc, *op. cit.*, VI, 1427), Canon 4—Hardouin, VII, 1910, Hefele-Leclerc, *op. cit.*, VI, 1428.

[151] Council of Toledo (1339, Hefele-Leclerc, *op. cit.*, VI, 841), Canon 1—Hardouin, 7, 1637; Mansi, 25, 1144. For Italy, see Council of Melfi (1284), Canon 7—Mansi, XXIV, 574 (Hefele-Leclerc, *op. cit.*, VI, 294); Council of Palermo (1388)—Mansi, XXVI, 751; see also Council of Tarragona (Spain: 1391), Canons 7 and 8—cit. in Hefele-Leclerc, *op. cit.*, VI, 1436.

[152] Council of Constance, Sess. XLIII, Canon 9—Hardouin, VIII, 880; Hefele-Leclerc, *op. cit.*, VII, 529.

of Buda in 1279 required the metropolitan to obtain the permission of the Holy See before transacting alienations. These were distinctly limited instances. For alienation, in general, the ancient discipline still prevailed.

When a Prelate wished to alienate Church property he required: (1) a consultation with the chapter of the place where the property was to be alienated, in order to discuss the necessity or utility of the proposed alienation; (2) the consent or subscription of the same chapter; (3) the approbation of the bishop, unless the chapter were exempt. The rector of a church which had no chapter needed only the consent of the bishop. The consent of the cathedral chapter was required for the alienation of property of the *mensa episcopalis*,[153] or of the cathedral chapter itself. The consent of the same chapter was also necessary for the alienation of less important non-exempt property when the bishop and not the church itself wished to dispose of the possessions, as for example, by the division or dismembration of a parish.

The Constitution "Ambitiosae" and Pre-Code Legislation Concerning Alienation

Abuses in the matter of alienation became rather frequent, and such contracts were entered into much oftener than the necessity or utility of individual churches required.[154] To provide a remedy for these evils Pope Paul II was constrained to issue on March 1, 1467, the Constitution *Ambitiosae,* which prohibited, without the consent of the Holy See, the alienation of immovable property or of movable property of considerable value:

> Ambitiosae, cupiditati, illorum praecipue, qui divinis et humanis affectati, damnatione postposita, immobilia et pretiosa mobilia Deo dicata, ex quibus Ecclesiae, Monasteria et pia loca reguntur illustranturque, et eorum ministri sibi alimoniam vindicant, profanis usibus applicare, aut cum maximo illorum ac divini cultus detrimento exquisitis

[153] Bona mensa episcopalis intelliguntur ea quae Episcopo sunt reservata pro sua sustentatione et generalibus dioecesis necessitatibus, uno verbo, bona quae dotationem Episcopi constituunt"—Wernz, *Jus Decretalium,* III, n. 179.

[154] Wernz, *Jus Decretalium,* III, n. 134; Rivet, *Institutiones Juris Ecclesiastici Privati,* II, n. 4.

mediis usurpare praesumunt, occurrere cupientes, omnium rerum et bonorum ecclesiasticorum alienationem, omneque pactum, per quod ipsorum dominium transfertur, concessionem, hypothecam, locationem et conductionem ultra triennium, nec non infeudationem vel contractum emphyteuticum, praeterquam in casibus a jure permissis, ac de rebus et bonis in emphyteusim ab antiquo concedi solitis, et tunc Ecclesiarum evidenti utilitate, ac de fructibus et bonis, quae servando servari non possunt, pro instantis temporis exigentia, hac perpetuo valitura constitutione fieri prohibemus, praedecessorum nostrorum constitutionibus, prohibitionibus et decretis aliis super hoc editis, quae tenore praesentium innovamus, in suo nihilominus robore permansuris. Si quis autem contra huius nostrae prohibitionis seriem de bonis et rebus eisdem quicquam alienare praesumpserit: alienatio, hypotheca, concessio, locatio, conductio et infeudatio huiusmodi, nullius omnino sint roboris vel momenti, et tam qui alienat, quam is, qui alienatas res et bona praedicta receperit, sententium excommunicationis incurrat. Alienanti vero bona ecclesiarum, monasteriorum locorumque piorum quorumlibet, inconsulto Romano Pontifice, aut contra praesentis constitutionis tenorem, si pontificali vel abbatiali praefulgeat dignitate, ingressus ecclesiae sit penitus interdictus. Et si per sex menses immediate sequentes sub interdicto huiusmodi animo (quod absit) perseveraverit indurato: lapsis mensibus eisdem, a regimine et administratione suae ecclesiae vel monasterii, cui praesidet, in spiritualibus et temporalibus sit eo ipso suspensus. Inferiores vero praelati, commendatarii et aliarum ecclesiarum rectores, beneficia, vel administrationem quomodolibet obtinentes, prioratibus, praeposituris, praepositatibus, dignitatibus, personatibus, administrationibus, officiis, canonicatibus, praebendis, aliisque ecclesiasticis cum cura et sine cura saecularibus et regularibus beneficiis quorum res et bona alienarunt duntaxat, ipso facto privati existant, illaque absque declaratione aliqua vacare censeantur, possintque per locorum Ordinarios, vel alios, ad quos eorum collatio pertinet, personis idoneis (illis exceptis, quae propterea privatae fuerint), libere de jure conferri, nisi alias dispositioni apostolicae sedis sint specialiter aut generaliter reservata; nihilominus alienatae res et bona huiusmodi ad ecclesias, monasteria et loca pia, ad quae ante alienationem huiusmodi pertinebant, libere revertantur....[155]

[155] C. un., *de rebus ecclesiae non alienandis*, III, 4, in Extravag. Com.

From the very beginning, the Church had always consented to alienation when it had a legitimate cause, and the causes always remained the same: necessity, utility and piety. The matter was definitely decided by the celebrated constitution *Ambitiosae,* renewed in 1624 by Pope Urban VIII,[156] and confirmed in 1869 by Pope Pius IX in the Constitution *Apostolicae Sedis*;"[157] they remained the body of the law on alienation until the promulgation of the Code.

From the text of the constitution *Ambitiosae,* from canonists, jurisprudence, and the Roman Curia, all alienations, before the Code, of immovable and precious movable church property were null if made without one of the causes: *necessitas ecclesiae, utilitas ecclesiae, pietas, incommoditas.*[158] When a just cause existed, alienations were still null if made without the deliberation, consent, and subscription of the chapter, the consent of the Ordinary, and the authorization of the Sovereign Pontiff.[159] In the concept of immovable property were included real servitudes, annual rents and revenues, and sums destined for the purchase of immovables or the construction of a church.[160] The authorization of the Holy See was not necessary for the alienation of immovables left to a moral person incapable of possessing them.[161] Neither was the authorization of

[156] S. C. Conc., decr. 7, Sept., 1624—*Fontes,* n. 2453.

[157] Constitutio Pii Papae IX, *Apostolicae Sedis,* IV, n. 3—*Fontes,* n. 552.

[158] "Quando res potius nocet quam prodest Ecclesiae, si fundus valde distet, vel expensae fere reditus aequunt aut forte superant"—Rivet, *Institutiones Juris Ecclesiastici Privati,* II, n. 4 sq; Wernz, *Jus Decretalium,* III, n. 165, n. 160; *cf.* S. C. Conc., *Anconitana,* 21 Apr., 1792—*Thesaurus Resolutionum* S. C. C., LXI (1792), 63-66, *Fontes,* n. 3877; S. C. Conc., *Civitatis Castelli,* 15 Jun., 20 Jul., 17 Aug., 1793—*Thesaurus,* LXII (1793), 172-182, 198, 200, *Fontes,* n. 3886; S. C. Conc., *Nullius Sublacen.,* 16 Jun., 7 Jul., 18 Aug., 1781; 11 Maii, 12 Jul., 1782—*Fontes,* nn. 3816, 3819, 3822, 3824.

[159] S. C. Ep. et Reg., *Ariminen.,* 7 Jan., 1579—*Fontes,* n. 1348; S. C. Ep. et Reg., *Pontis Curvi,* 14 Jun., 1788—*Fontes,* n. 1882; S. C. Conc., *Clodien.,* 19 Jan., 1606—*Fontes,* n. 2361.

[160] The Congregation of the Council likewise prohibited the exchange of these securities "excepto casu urgentis necessitatis . . . habito tamen Ordinarii beneplacito"—S. C. Conc., *Romana et aliarum,* 17 Feb., 1906, ad II—*Fontes,* n. 4328.

[161] S. C. Conc., *Ordinis S. Francisci,* 18 Mart., 1719—*Thesaurus,* I (1718-1719), 164, 165; *Fontes,* n. 3185; Aichner, *Compendium,* p. 778.

the Holy See required for renting up to a period of three years, for certain leases of *emphyteusis,* and for the sale of fruits, crops, and other objects which could not be easily kept. It was the bishop alone who could concede permission to alienate or rent church property within his power and not the vicar general, unless the latter was empowered to do so by a special mandate.[162] Moreover, one could alienate even immovable property without authorization when there was peril in delay, and necessity made it impossible to have recourse to Rome.[163]

Every alienation made without just cause and without the required solemnities was null and without effect. The Superior who had authorized it, and his successors had the right and the duty to revoke it. The purchasors were bound in conscience to restore the goods acquired, except for their right to claim damages and interest from those who had sold the property to them, and their right to be reimbursed by the ecclesiastical establishment to the amount of the enrichment on the sale. In the case of an alienation in which all the solemnities have been observed but in which the church has been gravely wronged, the establishment enjoyed the benefit of a *restitutio in integrum,* that is, it could have the property which was sold restored to it by offering in exchange to reimburse the price received.[164]

The constitution *Ambitiosae* carried an excommunication *latae sententiae nemini reservata* against *male alienantes, accipientes, et subscribentes.* Bishops and abbots *male alienantes* incurred the interdict *ab ingressu ecclesiae,* and if they continued to allow themselves to remain under this penalty for six months, they incurred the suspension *ab administratione beneficii et dignitate.* Inferior prelates and rectors of churches were deprived *ipso jure* of the benefice whose goods they had maladministered. All these penalties were incurred *ipso facto.* The Bull *Apostolicae Sedis* not only main-

[162] Wernz, *Jus Decretalium,* III, p. 183; Schmalzgrueber, lib. III, tit. 13, n. 99.

[163] S. C. de Prop. Fid., 27 Aug., 1832, 31 Mart., 1836—*Coll.,* n. 827; *Fontes,* nn. 4753, 4763.

[164] *Cf.* S. C. Conc., *Faventina,* 14 Maii, 11 Jun., 3 Sept., 1825; 26 Jun., 1830—*Fontes,* nn. 3995, 3998, 4032.

tained the excommunication but extended it to bishops, abbots and other prelates when these would not have come under the provisions of the constitution *Ambitiosae*. There was, however, a difference of opinion among the canonists on this point. At any rate, the interdict and suspension, not mentioned in the constitution *Apostolicae Sedis*, had to be considered as no longer existing, but the penalties against inferior prelates remained as they were by the fact that no new text abolished them.[165]

The constitution *Ambitiosae* had an enormous influence on subsequent church law. The Council of Trent, however, did not treat the question in any detail. It was content with merely decreeing that no renting of church property was to be considered as valid, which was prejudicial to the successor in the benefice, notwithstanding any indult or privilege.[166] Cardinal Pole, inserted a decree into the acts of the council, however, that was to apply the constitution *Ambitiosae* to England.[167] The Constitutions of several succeeding Popes renewed the dispositions of the constitution *Ambitiosae* in the struggle against abuses.[168]

[165] Pennacchi, *Commentaria in Constitutionem "Apostolicae Sedis,"* II, 116-154; Hollweck, *Die kirchlichen Strafgesetze*, pp. 241-246; Wernz, *Jus Decretalium*, III, n. 165; Leech, *A Comparative Study of the Constitution "Apostolicae Sedis" and the "Codex Juris Canonici,"* p. 102; S. C. Off., *Ratisbonen*, 22 Dec., 1880, ad V—*Fontes*, n. 1068; S. C. Conc., *Romana*, 16 Aug., 1806, ad VI—*Fontes*, n. 3932; S. C. C., *Camerinen.*, 17 Dec. 1814, ad 2—*Fontes*, n. 3944; S. C. C., *Compsana*, 2 et 30 Aug., 1845—*Fontes*, n. 4089; S. C. C., *Fanen.*, 22 Mar., 19 Apr., 1823—*Fontes*, n. 3979; S. C. C., *Capuana*, 15 Jul., 1848—*Fontes*, n. 4107; S. C. C., *Pinnen.*, 14 Maii, 1859, 28 Apr., 1860—*Fontes*, nn. 4175, 4181.

[166] Conc. Trid., sess. XXV, *de ref.*, Canon 11—Mansi, XXXIII, 188, 189; Hardouin, X, 185; Devoti, *Institutiones*, II, 137 sq.

[167] Conc. Trid., Decretum X (*de ref. Angliae*—a. 1556)—Hardouin, X, 407.

[168] Paul IV, Const. *Iniunctum nobis*, 14 Jul., 1555—*Fontes*, n. 88; Pius V, Const. *Admonet nos*, 29 Mart., 1567—*Fontes*, n. 120; Gregory XIII, Const. *Inter caetera*, 26 Maii, 1572—*Fontes*, n. 142; Sixtus V, Const. *Quanta apostolicae*, 18 Mart., 1586—*Fontes*, n. 158; Gregory XIV, Const. *Romanus pontifex*, 19 Dec., 1590—*Fontes*, n. 168; Innocent IX, Const. *Quae ab hac*, 4 Nov., 1591—*Fontes*, n. 174; Clement VIII, Const. *Ad Romani*, 14 Feb., 1592—*Fontes*, n. 175; Paul V, Const. *Inter caetera*, 30 Dec., 1605—*Fontes*, n. 193; Urban VIII, Const. *Sacrosancti*, 30 Sept., 1623—*Fontes*, n. 203.

The influence of the constitution *Ambitiosae* is noticed in the regional councils of the sixteenth century. In Italy, the second Council of Milan, held in 1569, embodied principles of the constitution *Ambitiosae* in several of its canons.[169] In Belgium the Council of Malines in 1570,[170] and in France, the Council of Tours in 1583,[171] added precisions to the law in this way. The general Council of Mexico held in 1585 embodied almost verbatim in its canons, legislation from the constitution *Ambitiosae,* the Council of Trent and many Spanish councils.[172] In the Church of Italy in the seventeenth and eighteenth centuries, the constitution *Ambitiosae* continued to serve as the basis of law on alienation,[173]

The practice in the Church of Austria during the ninetenth century was governed by the concordat with the Holy See, and the consent of both the civil and ecclesiastical authorities was to be obtained before alienating church property. The consent would be granted only in a case of urgent necessity or evident utility. Alienation of movable property for the purchase of immovables was permitted and even advised. Also cumbersome properties difficult to administer and yielding little revenue were permitted to be divided into more convenient lots. However, in reference to property of little worth—not exceeding one thousand florins in value—the

[169] Council of Milan, tit. III, decret. 5-11—Hardouin X, 750-752.

[170] Council of Malines, Canons 1, 2—Mansi, XXXIV, 577; Hardouin, X, 1171.

[171] Council of Tours, Canon 20—Hardouin, X, 1436, 1437.

[172] Council of Mexico, lib. III, tit. 8 (II, III)—Hardouin, X, 1676; Mansi, XXXIV, 1110-1112.

[173] *Cf.* Council of Benevento (1693), cap. un., tit. 23—*Collectio Lacensis,* I, 52; Council of Rome (1725), cap., un., tit. 19, I (II, III)—*Coll. Lac.,* I, 380, 381; Council of Naples (1699), cap. un., tit. 13 (10)—*Coll. Lac.,* I, 241; National Synod of Albano (1703), Pars IV, Canon 2—*Coll. Lac.,* I, 327; Brief of Pope Benedict XIII to the city and diocese of Benevento (a. 1724)—*Coll. Lac.,* I, 441, 442. The same principles of law held among the Oriental rites. See also: Provincial Synod of Ruthenians (Greek Uniate Rite) at Zamosca (Russia) in 1720, c. 13—*Coll. Lac.,* II, 59; Maronite Synod of Mount Lebanon (1736), Pars IV, c. 1, nn. 12-14—*Coll. Lac.,* II, 352, 353; *idem.,* c. 2, n. 3—*Coll. Lac.,* II, 357; Armenian Council in Bzommar (Cilicia, Asia Minor) (1866)—*Coll. Lac.,* II, 572, 576; Apostolic Letters of Pius IX to the Fathers of this latter council; letter I and letter II, n. 7—*ibidem.*

bishop retained his faculty of granting permission to alienate to all rectors and administrators under him.[174]

In Holland, the Council of Utrecht in 1865 incorporated the constitution *Ambitiosae* into its statutes,[175] placing special emphasis on paintings, statues, sacred vessels and vestments, and all other movables belonging to church edifices. They were not to be alienated without just cause. The permission of the bishop was sufficient if these were of little value, the consent of the Holy See if they were more valuable, by reason of the material, artistry, or antiquity.[176]

In France, the Council of Lyons in 1850 recalled in passing the common law of the church on alienation.[177]

The second Council of Westminster (1855) in England recalled that the alienation of church property must be necessary before it could be permitted, and that the bishop should see to it that the necessary precautions were observed before proceeding to grant the permission.[178]

In Canada, the Council of Quebec in 1854 forbade administrators of church property to give, sell, exchange, or in any other way alienate church properties, whether movable or immovable, give in loan, in lease of *emphyteusis*, or in mortgage, without first having consulted the bishop and obtained his express permission, except in cases permitted by law.[179]

The First Plenary Council of Baltimore is silent on the question of alienation but the Second Plenary Council of Baltimore legislates that the priests of the United States shall not contract debts by rashly erecting and repairing churches, etc., nor shall they borrow money without first obtaining a written permit from the bishop.[180] Belongings of the church shall not be turned to other uses than those

[174] Council of Vienna (1858), tit. VII, caput 6, § 5—*Coll. Lac.*, V, 219; Council of Prague (1860), tit. VII, caput 2—*Coll. Lac.*, V, 573; *idem.*, tit. VIII, caput 1, A 2—*Coll. Lac.*, V, 583.

[175] Tit. X, c. 1—*Coll. Lac.*, V, 922, 923.

[176] Tit. X, c. 3—*Coll. Lac.*, V, 925.

[177] Decret. 23, n. 7—*Coll. Lac.*, IV, 482.

[178] Decret. 8, n. 8—*Coll. Lac.*, III, 981.

[179] Decret. 15, § 2, n. 4—*Coll. Lac.*, III, 657.

[180] *Acta et Decreta Conc. Plen. Balt. II* (1866), n. 192—*Coll. Lac.*, III, 89.

intended by the donor.[181] During the vacancy of the episcopal see, the administrator is not to alienate the property of the church.[182]

The Third Plenary Council of Baltimore held in 1884, contains some very important dispositions in this matter. Due to circumstances peculiar to the Church in the United States—impossibility of recourse to Rome in each case for permission to alienate—an indult was granted whereby the bishops were not bound by the solemnities set down in the law concerning alienation. These special and extraordinary faculties were granted for ten years and to be renewed after that. In the use of these faculties, it was cautioned that the advice of the consultors should be taken on the necessity of the alienation and its evident utility to the church. At the end of each three years, the bishops were to report to the Congregation (of the Propagation of the Faith) setting forth the circumstances of each alienation, the amount and the reasons, as well as the financial state of their missions for which these sums were used.[183]

The law as set down in the Third Plenary Council of Baltimore was that bishops were free to grant permission, with the necessary *cautiones,* to alienate church property where the amount involved did not exceed the sum of five thousand dollars. Above this amount, the advice of the diocesan consultors was necessary, and following this the permission of the Holy See.[184] Priests were cautioned against transfering into their own name any of the church property, such as churches, schools, rectories, cemeteries, etc., toward the acquisition of which the faithful have contributed. Likewise, pastors were not to deposit in their own name the revenues of church collections or other church revenues. Violation of these laws was to be punished according to the local diocesan statutes.[185]

[181] *Acta et Decreta Conc. Plen. Balt. II,* nn. 187, 188—*Coll. Lac.,* III, 57, 71.

[182] *Acta et Decreta Conc. Plen. Balt.* II, n. 99—*Coll. Lac.,* III, 429.

[183] *Acta et Decreta Conc. Plen. Balt. III,* p. ciii, and n. 20, 6°.

[184] *Conc. Plen. Balt. III,* Canon 20, n. 6; *cf.* Leech, *A Comparative Study of the Constitution "Apostolicae Sedis" and the "Codex Juris Canonici,"* p. 103; Putzer, *Commentarium in Facultates Apostolicas,* p. 430.

[185] *Conc. Plen. Balt. III,* Canon 280; *cf. Conc. Plen. Balt. II,* Canons 188, 192; Council of Hartford, II (1878), Canon 121; Council of Hartford, III (1886), Canon 201; etc.

The Plenary Council of Latin America, held in 1899, applied to those regions the principles set forth in the constitution *Ambitiosae* and the Council of Trent.[186] However, since much depended on the circumstances of time and place as to what was to be considered property of little value, a decision by the Holy See for each individual region was to be desired.[187]

The special Indult granted to the bishops of the United States at the time of the Third Plenary Council of Baltimore was renewed for the last time before the Code in 1916. It was worded to the effect that by reason of peculiar circumstances in the United States —distance from Rome, etc.—Ordinaries were not bound to observe the solemnities prescribed by Canon Law as regards the alienation of ecclesiastical property when there is a question of changing the properties and holdings of the diocese, subjecting them to mortgage, or doing other transactions which are in the nature of alienation.[188]

On the eve of the effective promulgation of the Code, the Consistorial Congregation called to the attention of bishops the fact that the Code in Canon 1532 granted to them extended powers, and since in most cases, these powers of the common law extended to and even beyond the faculties of their particular Indults, these latter no longer needed to be renewed.[189]

[186] *Conc. Plen. Americae Latinae,* Canons 869, 871.

[187] *Conc. Plen. Americae Latinae,* Canon 870.

[188] S. C. Conc., 31 Jul., 1916—*AER,* LV (1916), 664 (private response).

[189] *Decret. S. C. Consistorialis,* 25 Apr., 1918: "Proxima sacra Pentecostis die, novo Ecclesiasticarum legum Codice vim obtinente, omnes locorum Ordinarii facultatibus quam pluribus ipso jure instruentur, quos antea ab Apostolica Sede postulari solebant et communibus indultis assequebantur. Sufficit enim consulere canonem . . . 1532 circa alienationes . . . ut illico appareat Episcopos, vi codicis, tanta munitos esse potestate, ut, quoties Ecclesiae utilitas, et animarum salus id requirat, communis legis rigorem temporare et justa dispensationes largiri aeque opportuneque valeant"—*A. A. S.,* X (1918), 190; *cf. AER,* LIX (1918), 87.

CHAPTER IV

SOLEMNITIES REQUIRED FOR ALIENATION

The alienation of church property, understood in the sense of Canon 1533, *non solum alienatio sed quilibet contractus quo conditio Ecclesiae peior fieri possit,* is now controlled by Canons 1529 to 1543, which have introduced certain significant changes in the canonical legislation. The old distinction between immovable and movable property no longer exists. It is according to the value of the goods to be alienated that the necessary authorizations are to be governed. Except for the reservations made in Canon 1529,[1] Canon Law adopts, for all that concerns contracts, the dispositions and prescriptions of the civil law of the land. In many other respects, however, the legislation anterior to the Code has not been abrogated, and it will be indispensable on many points to consult the old law and its interpretations.

Precautions Before Alienation

Canon 1530, § 1. "Salvo praescripto can. 1281, § 1, ad alienandas res ecclesiasticas immobiles aut mobiles, quae servando servari possunt, requiritur: 1° Aestimatio rei a probis peritis scripto facta; 2° Iusta causa, idest urgens necessitas, vel evidens utilitas Ecclesiae, vel pietas; 3° Licentia legitimi Superioris, sine qua alienatio invalida est.

§ 2. "Aliae quoque opportunae cautelae, ab ipsomet Superiore pro diversis adiunctis praescribendae, ne omittantur, ut Ecclesiae damnum vitetur."

Canon 1530 concerns those *cautelae* which are to precede every alienation. Of these, the canon requires the first two for liceity

[1] " . . . nisi juri divino contraria sint aut aliud jure canonico caveatur." *Cf.* Canons 1513, 1515, 1516, 1530, ff.

only, and the third for validity. In the Code is found the same general rule as in the constitution *Ambitiosae,* namely, that unless it concerns perishable things, *quae servando servari non possunt,* ecclesiastical administrators can never of their own authority and without observing the prescribed solemnities proceed to any alienation, *salvo praescripto canonis* 1281, § 1.

The reference to Canon 1281 is to recall that the alienation, or even the definite transfer of notable relics or precious paintings,[2] or relics or paintings which are the object of great veneration in a given church, can never be made validly without the formal authorization of the Holy See. In passing it may be noted that in Canon 1281 there is no question of relics or paintings belonging to private persons, or to associations not erected as ecclesiastical moral persons. Likewise the canon would not be concerned with those relics, etc., belonging to a collegiate moral person but attached to no church. As to the meaning of *ecclesia* in Canon 1281, there may be some question as to whether the concept would include a public oratory. According to Canon 1191, § 1, *oratoria publica eodem jure quo ecclesiae reguntur.* Nevertheless, since Canon 1281 is clearly correlated with Canon 1280, it does not seem that the prescription of the law should be strictly extended to include public oratories. Canon 1280 speaks expressly of public oratories, whereas, in the same matter in the following canon, churches alone are mentioned. By that token the law would appear to restrict itself. In no way does the law apply to semi-public oratories.[3] It should be mentioned also that Canon 1281, § 1, is different than the general canons on alienation in that it does not strictly imply ownership. To whom these sacred relics or paintings, etc., may belong is not the first concern of the canon. The determining factor is that they be honored by great veneration of the people in some definite church.[4] Then, after the stability of these relics has been guaranteed the problem of ownership may be debated, if such be the case. When the canon forbids their transfer *in aliam ecclesiam,*

[2] Canon 1281, § 2.

[3] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 282.

[4] *Cf.* S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 418.

it means all other semi-public and private oratories *a fortiori,* and of course museums, even though ecclesiastical. Temporal transfer of these church treasures, even if for a fairly long time, is not reproved if done with a just cause.[5]

Votive offerings, however, must be considered in a different light. The fact that they are offered by the donor from motives of religion, places them outside of all possibility of alienation. Therefore the Congregation of the Council decided that the permission to alienate all such objects was reserved to the Holy See *cuius est solvere ligata et in coelo et in terra.*[6] The intention of the donor is presumed to mean that the object was not intended to be alienated by the particular church; rectors are only the custodians of the votive offerings; and in any eventuality the Holy See alone may interpret the intention of the donor.[7]

Canon 1530, § 1. "Ad alienandas res ecclesiasticas immobiles aut mobiles, quae servando servari possunt."

In summary, let it be said that the word "alienation" in Canon Law has a meaning much wider than that understood in ordinary language. It may be said to include all acts whereby a thing is caused to pass permanently from the full ownership of one to the full ownership of another, as sale, donation, exchange, loan for consumption; any act transferring to another a real right over a thing, which however, still remains in the *dominium* of the one ceding the real right, such as the setting up of a servitude, granting a usufruct, and the like. More than that, alienation is also to be understood as any legal act having for purpose the giving to another as guarantee a thing over which the grantor retains ownership, as taking a mortgage on church property; moreover, any act, which grants to another the prolonged use of, or places certain particular condi-

[5] Canon 1281, § 1; Vermeersch-Creusen, *Epitome,* II, 610.

[6] S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 419: "Dubium: An donaria votiva alienari possint absque beneplacito Apostolicae Sedis. Responsum: Negative."

[7] S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 418, 419.

tions on, a thing over which the ownership is retained, as loans, long-term leases, renting, is also understood to be an act of alienation controlled by the canons.[8] Lastly, the concept also includes all acts or contracts capable of rendering worse the conditions of an ecclesiastical moral person, whether these contracts be onerous or gratuitous.[9]

The object of the canon is *res ecclesiasticae,* those things belonging to an ecclesiastical moral person, canonically erected. Not all church property is touched by the canon, but only immovables or movables, *quae servando servari possunt,* not consumed by first use. There remain outside the prohibition of the canon perishable things and objects whose conservation, difficult in itself, would incur the danger of partial or total loss to the church corporation.[10] Also it seems that incommodious immovable property, absolutely useless to the church, is not an object of the general prohibition against alienation.[11]

Likewise, it must be accepted as a rule that administrators can alienate, of themselves and on their own authority, both immovable and movable goods whenever there is peril in delay. They will not be considered as held by the general law of the Code when they conscientiously believe they have serious motives to fear that either the property will really perish in their hands or that the delay which the carrying out of the ordinary formalities will necessarily occasion will result in considerable loss to the corporation which they represent.[12]

It may be held as the rule that venerated relics, precious images,

[8] Reiffenstuel, lib. III, tit. 13, nn. 2, 3; Barbosa, *Jus Eccles. Univ.,* lib. III, tit. 30, n. 2; Fagnanus, *Commentaria,* lib. III, tit. 13, nn. 1, 34.

[9] Canon 1533.

[10] Reiffenstuel, lib. III, tit. 13, n. 7; Wernz, *Jus Decretalium,* III, p. 181.

[11] De Meester, *Compendium,* III, 1584. Vermeersch-Creusen, *Epitome,* II, 852. Wernz, *Jus Decretalium,* III, p. 182. Larraona (*CpR,* XIII (1932), [4]) affirms the contrary: "Antiqua aliquorum doctrina juxta quam venditio praedii, etiam non exigui, quod plus incommodi quam utilitate affert non esse alienationem, nunc teneri non valet." *Cf.* Barbosa, *Jus Ecclesiasticum Universum,* lib., III, tit. 30, n. 19; Fagnanus, *Commentaria,* lib. III, tit. 13, n. 27; Schmalzgrueber, lib. III, tit. 13, n. 53.

[12] A. Couly, *Dictionnaire de Droit Canonique,* v. "Alienation."

immovable property (not only houses, etc., but incorporeal rights, titles, annual revenues, things attached to the soil, etc., which are likened to immovable property) and movable, *quae servando servari possunt* (having a certain value and not consumed with first use, etc.),[13] may not be alienated without due solemnity of law.

On the other hand, alienation without the solemnities is entirely permissible for perishable movable property, goods given or left to the church on the condition that they be sold, and always in cases of extreme necessity, when the provisions of the Code cannot be observed without grave injury to the Church.

> **Canon 1530, § 1. "Requiritur: 1°. Aestimatio rei a probis peritis scripto facta; 2°. Iusta causa, idest urgens necessitas, vel evidens utilitas Ecclesiae, vel pietas; 3°. Licentia legitimi Superioris, sine qua alienatio invalida est."**

The word "required," common to each of the three requisites, is concerned with liceity, except where expressly mentioned otherwise in number three.

The appraisal of the object means the estimate of its value in view to alienation.[14] The price or value is not to be considered solely in the abstract; the actual commercial value must be a strong consideration. At least two honest and trustworthy experts are to be called in consultation to determine the value.[15] The honesty and

[13] The basis for exemption from the laws regulating alienation is the negligible value or consumption with the first use. Coronata, *Institutiones Juris Canonici,* II, 1071) speaks rather loosely when he says: "Non subjiciuntur solemnitatibus alienationes rerum mobilium non pretiosarum seu minimi momenti"; De Meester, *Compendium,* III, 1484, likewise. With the new procedure organized by the Code, the Canon *Terrulas* (c. 53, C. XII, q. 2) has no longer any reason to exist and should be considered as definitely abrogated—which does not change things much since in the case foreseen in that Canon, the authorization of the bishop was always required. A. Couly, *Dictionnaire de Droit Canonique,* v. "Alienation."

[14] Not, of course, the offered price; C. I. C., 24 Nov., 1920, ad I—*A. A. S.,* XII (1920), 577.

[15] Canon 1794; *Reg. Jur.,* 40, in VI°: "Pluralis locutio duorum saltem numero est contenta."

trustworthiness of these men is left to the judgment of the ecclesiastical superior. The appraisal must be made in writing,[16] but it does not seem that the superior may go any further and demand an oath as to truthfulness.[17] since the canon does not appear to require it. If the appraisal does not seem to be sufficient or correct, a new one may be sought from others.

The competent superior, presented with a demand for authorization, must first of all find out whether the alienation contemplated has one of the just causes enumerated:[18] urgent necessity, evident utility, or piety. Any one of these causes enumerated is sufficient. It seems that the enumeration is closed, admitting of these three only.

The necessity must be urgent, for unless necessity urges, leaving no place for deliberation, a solution to the necessity other than alienation must be sought, since alienation is odious to the law. What the necessity must be is not defined. In general, it may be the pressing need of some ecclesiastical establishment as the payment of an urgent debt, the necessity of restoring a church which is falling in ruins, the purchase of vestments or sacred vessels indispensable to the exercise of worship, and similar reasons.[19]

The second cause is the evident utility of the church. These three words in the canon were chosen for a purpose. The "usefulness" of the alienation must be "evident," perfectly apparent and excluding all doubt. It must be positive. It is not sufficient that the church merely suffer no damage. The welfare of the church is concerned, not that of individuals or any particular work. *Utilitas Ecclesiae* is present when the alienation, far from impoverishing, will procure an appreciable advantage, as the alienation of a piece

[16] S. C. Prop. Fid., instr. (ad Patriarch. Armen.), 30 Jul., 1867, n. 1—*Coll.*, n. 1310.

[17] Canons 1797, ff.

[18] C. 70, C. XII, q. 2; c. 1, *de reb. eccles. non alien.*, III, 9, in VI°; Fagnanus, *Commentaria*, lib. III, tit. 13, n. 8; Schmalzgrueber, lib. III, tit. 13, n. 54; Hostiensis, *Summa Aurea*, p. 238.

[19] C. 1, *de reb. Eccles. non alien.*, III, 4, in Clem.; S. C. Prop. Fid., instr. (ad Patriarch. Armen.), 30 Jul., 1867, n. 1—*Coll.*, n. 1310; Barbosa, *Jus Ecclesiasticum Universum*, lib. III, tit. 30, n. 12; Reiffenstuel, lib. III, tit. 13, n. 18.

of land difficult of access or of insignificant production, to acquire other lands or titles of a surer and much more considerable revenue.[20]

The third cause, *pietas,* supposes the will and the duty to bring aid either to another work or church corporation or even to individuals who are in distress or misfortune. It must not be forgotten that the goods of the church have always been the patrimony of the poor, and that the church has never hesitated to impoverish and even despoil herself to practice the great precept of charity which remains, for her as well as the faithful, the sublime command of her Divine Founder. By "piety," then, may be understood any Christion work of religion or of mercy, corporal as well as spiritual: the alienation of the church's goods to succor the needy in times of distress to build new churches and schools necessary for the people, or to purchase burial grounds.[21]

If any of these motives cannot be alleged, the superior should absolutely refuse the authorization asked. If not, he himself assumes the responsibility he shares, moreover, with the administrators and acquirers of the property, in the supposition that they, like him, are in bad faith and know the initial defect of the whole operation.[22]

Lastly, the permission of the legitimate superior is required for the validity of the alienation. Since the validity of the transaction is involved, this consideration becomes very important. Canon 1532

[20] C. 52, C. XII, q. 2; c. 8, X, *de reb. Eccles. alien. vel non,* III, 13; Reiffenstuel, lib. III, tit. 13, nn. 19, 20; S. C. Prop. Fid., instr. (ad Patriarch. Armen.), 30 Jul., 1867, n. 1—*Coll.* n. 1310; Barbosa, *Jus Eccles. Univ.,* lib. III, tit. 30, nn. 13, 16, 17.

[21] Vermeersch (*Epitome,* II, 852), makes the astounding statement that the third cause, *pietas,* is newly added to the other two by the Code, when as a matter of fact it is the oldest legitimate cause for alienation, though it may have been called by other names. See in particular: the *Corpus Juris Civilis* of the Emperor Justinian, a. 534 (supra: Ch. II, Roman Law), the letters of Pope Gregory the Great (598) (cc. 14, 15, 16, C. XII, q. 2), the eighth oecumenical council, the fourth of Constantinople (869), c. 15—Mansi, XVI, 168, 169; Schmalzgrueber, lib. III, tit. 13, n. 57; Wernz, *Jus Decretalium,* III, p. 182; Barbosa, *Jus Ecclesiasticum Universum,* lib. III, tit. 30, n. 18; Reiffenstuel, lib. III, tit. 13, n. 21; Pistocchi, *De Bonis Ecclesiae,* p. 386; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 283, 2, c.

[22] Pistocchi, *De Bonis Ecclesiae Temporalibus,* p. 387.

contains the law as to who this legitimate superior is, varying according to the different transactions. Suffiicent it is to say at this point that an act alienating ecclesiastical property without the permission of the legitimate superior as required in Canon 1530, § 1, n. 3, is completely null and void (c. 1680), and not merely rescindible. An act which is completely null cannot be ratified except by the supreme legislator in cases where the nullity was due to the lack of some formality required by law and from which the legislator has power to dispense. In such cases, ratification by the supreme legislator amounts to a dispensation from the formality and makes the act good from the time of the ratification, but it is not retroactive except by fiction of law operative only between the parties themselves who consent was originally given.[23] It is hardly necessary to add that however unimportant the object of the alienation may be, it is always extremely prudent, though not required by the general law of the Code, to request that the permit of alienation be given in writing and contain mention of the carrying out of all the prescribed formalities. The text, or at least its authentic copy, is to be joined to the act of alienation and remain in the safekeeping of the church corporation. The one acquiring the church property is likewise acting prudently in demanding for himself a certified copy of the decree of alienation, which, in case of contention arising at a subsequent date, will permit him to prove that all the details of the law have been fulfilled.[24]

Canon 1530, § 2. "Aliae quoque opportunae cautelae, ab ipsomet Superiore pro diversis adiunctis praescribendae, ne omittantur, ut Ecclesiae damnum vitetur."

It can happen that by reason of circumstances, the bishop may deem it necessary to impose certain precautions or supplementary formalities not provided by the general law. This paragraph of

[23] S. C. Conc., *Albinganen. et aliarum,* 17 Maii, 1919—*A. A. S.,* XI (1919), 386, 387; vide c. 1, *de reb. Eccles. non alien.,* III, 9, in VI°; c. 1, *de reb. Eccles. non alien.,* III, 4, in Clem.; c. un., *de reb Eccles. non alien.,* III, 4, in Extrav. Comm.; Schmalzgrueber, lib. III, tit. 13, n. 69.

[24] Couly, *Dictionnaire de Droit Canonique,* v. "Alienation."

Canon 1530 gives the Ordinary on these points the widest latitude and authority, and enjoins the administrators to follow exactly the orders given, in the effort to avoid all prejudice to the Church. Thus, besides those precautions imposed *a jure* in paragraph one and common to all alienations, others *ab homine* may be added in virtue of the second paragraph, due to special conditions of place, time, object, or person. These supplementary formalities to be added to those prescribed by common law may be for each separate case in question, imposed by the Ordinary granting the permission, or they can be those general precautions formulated by the Ordinary binding on all alienations transacted within his own diocese. These precautions may concern, for instance, the documents to be drawn up, the notifications to be made to the chancery office, the careful observation of civil law formalities, and so on. By Canon 1530, § 2, ecclesiastical superiors have a strict duty (*praescribendae*), and administrators as well (*ne omittantur*), to see that these precautions are respectively prescribed and carried out. The purpose is to forestall any harm or injury to the Church, whether it be material damage, resulting from unwise alienations, or moral injury, giving rise to such derogatory accusations as ignorance, carelessness, or inadvertence to the civil laws.[25]

Formalities in the Act of Alienation

Canon 1531, § 1. "Res alienari minore pretio non debet quam in aestimatione indicatur.

§ 2. "Alienatio fiat per publicam licitationem aut saltem nota reddatur, nisi aliud circumstantiae suadeant; et res ei concedatur qui, omnibus perpensis, plus obtulerit.

§ 3. "Pecunia ex alienatione percepta caute, tuto, et utiliter in commodum Ecclesiae collocetur."

This canon treats in paragraphs one and two the formalities to be observed in the act of alienation itself and in paragraph three the procedure immediately following the alienation.

[25] Pistocchi, *De Bonis Ecclesiae Temporalibus*, pp. 392, 393.

Immovable and movable church property mentioned in Canon 1530 cannot be alienated for a lesser price than indicated in the written estimates.[26] There is no ground for alleging that the alienation is licit because the offer, though less than the estimate, is still a just price. If the estimate is not fixed, but places the just price as somewhere between certain limits, then it suffices to attain the lesser limit. The text of the canon is clear and allows of no exception. It would not indeed be invalid but doubtless illicit and quite conceivably unjust, to carry through an alienation contrary to this law. Therefore, if the estimated price is not reached or no purchaser can be found, either the alienation must be absolutely put off and a new authorization obtained from the ecclesiastical superior, given in the same form as the previous, or the experts can be called in again, the same ones or others, and another consultation held on whether the estimate may not possibly be lowered, all things being taken into consideration. Of course it is clear that as long as the price remains just, it may exceed the limits of the experts' estimate.[27]

Once the decree for alienation is obtained, but not before, one may go ahead with the alienation, which can be done only by the administrators of the religious corporations and in the name of these latter. In the case of a sale, lease, or renting, the Code desires that as a general rule this be done by means of a public auction, announced in advance and carried out in the ordinary way, that is *sub hasta,* under the auctioneer's flag. The auction should be public not only *de jure*—open to the public and accessible to all—but public *de facto* with notices posted and all concerned being invited.[28]

[26] Canon 1530, § 1, 1°; S. C. Prop. Fid., instr. (ad Patriarch. Armen.), 30 Jul., 1867, n. 1—*Coll.,* n. 1310.

[27] Vermeersch-Creusen, *Epitome,* II, 853; Augustine, *A Commentary,* VI, 596; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 283; De Meester, *Compendium,* III, 1485; C. I. C., 24 Nov., 1920—*A. A. S.,* XII (1920), 577.

[28] Bened. XIV, motu porprio *Essendo,* 23 Nov., 1742, nn. I, II—*Fontes,* n. 332; S. C. Ep. et. Reg., *Aquaependen.,* 2 Sept., 1793—*Fontes,* n. 1888; S. C. Ep. et Reg. decr. 18 Mart., 1835—*Fontes,* n. 1905; S. C. C., *Ordinis S. Francisci,* 18 Mart., 1719—*Thesaurus,* I, 164, 165—*Fontes,* n. 3185; S. C. Ep. et Reg., *Nucerina,* 23 Jan., 1784—*Fontes,* n. 1879; S. C. de Prop. Fid., instr. (ad Pa-

It can happen that public auction is not possible. Very often the auction may entail heavy expenditures or lead to fraud in the auctioning or bidding. Canon 1531, § 2, then requires that the sale at least be made public, that is, sufficiently announced so that all the prospective buyers may be present. This seems quite the normal way in which to alienate church property in the general run of circumstances. Yet there is often a decided advantage in making a sale or letting out a lease without publicity and without the knowledge of outsiders. There are many things which can urge not only the omission of an aucton but also of the very divulgation of the intended alienation. These reasons may be, among others, the danger of public scandal, fear of molestation by the civil authorities, law suits, suspicion, calumny, and even the loss of the good name of the moral person compelled to sell. In the case where the permission is sought from the Holy See, the local Ordinary is the judge of the circumstances, to be noted in the petition; likewise, when the permission of the Holy See is granted for a public auction, and then circumstances persuade otherwise, it is the office of the Ordinary to make the decision.[29]

The general rule is that the property goes to the highest bidder. This is the rule of all public auctions and sales, and this rule, besides, is the result of a tacit contract which takes place in each particular case between the alienators on one hand and the bidders on the other, so that the auction would be of no worth if the property were to be sold to a low bidder to the detriment of another who bid higher. This would not be the case, however, if a previous auction had ended without a sale, and the same property were later sold at auction, or in any other way, even at a price lower than that previously offered.[30]

The above is the ordinary rule concerning sale at auction. However, in alienation, the good of the Church is to be sought rather than that of the buyer. Hence, the property will be sold rather to

triarch. Armen.), 30 Jul., 1867, n. 1—*Coll.*, n. 1310; Pistocchi, *De Bonis Ecclesiae Temporalibus*, p. 398.

[29] Vermeersch-Creusen, *Epitome*, II, 853; Vromant, *De Bonis Ecclesiae Temporalibus*, n. 284; Augustine, *A Commentary*, VI, 596.

[30] Couly, *Dictionnaire de Droit Canonique*, v. "Aliénation."

the one who, not *absolute* but *omnibus perpensis* shall offer the highest price. In the appreciation of bids there must be taken into consideration the honor and trustworthiness of the purchasor, the manner of payment, whole or partial, the means of payment, cash or securities, etc., the guarantees of payment, the danger of impugning the purchase, the risk of law suits, and the particular advantages or special concessions which, added to the price, may appreciably increase the value. Thus, in drawing up a notice of auction, whenever there is occasion for this, special effort must be made to have all concerned specifically notified that if the property is to be sold to the highest bidder, the welfare of the Church must be provided for in every respect.[31]

Canon 1531, § 3. "Pecunia ex alienatione percepta, caute, tuto, et utiliter in commodum Ecclesiae collocetur."

In a case where no money passes hands this prescript of the canon does not apply. Generally speaking, money is either mediately or immediately obtained from alienation. Paragraph three speaks of these normal cases and lays down the general rule that the revenue perceived from a useful alienation is to be invested to the advantage of the Church.[32] The advantage of the Church in general is understood and not solely the advantage of a particular church corporation, since it is natural in such a close union as the body of the Church, the welfare of one of her member corporations can very directly affect many others of the same diocese for example. The common law of the Code requires that the money be

[31] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 284.

[32] S. C. Ep. et Reg., *Assissien.,* 4 Oct., 1823—*Fontes,* n. 1898; S. C. de Prop. Fid. (C.P. pro Sin.—Cochinchin.) 28 Aug., 1832—*Coll.,* n. 827; S. C. de Prop. Fid., litt. (ad Vic. Ap. Cochinchin.) 31 Mart., 1836—*Coll.,* n. 827 (note 1); S. C. Conc., *Nullius Sublacen.,* 11 Maii, 13 Jul., 1782—*Thesaurus,* LI (1782), 71, 97; S. C. Conc., *Civitas Castelli,* 15 Jun., 20 Jul., 17 Aug., 1793, ad I—*Thesaurus,* LXII (1793), 178-182, 198, 200; S. C. de Prop. Fid., instr. (ad Patriarch. Armen.), 30 Jul., 1867, nn. 1, 5—*Coll.,* n. 1310; S. C. S. Off., 20 Aug., 1778—*Coll.,* n. 529; *cf.* Ojetti, *Synopsis,* n. 304.

judiciously invested having the essential elements of a reasonable guarantee and a fair return.[33]

Does the canon allow of any exception to the general rule obliging the investment of the revenue obtained from alienation? The Sacred Congregation of the Council in a 1919 decision answered this query by stating that the canon allowed of no exception. Permission to spend immediately the money obtained by alienation could only be given by the Holy See in the form of a dispensation from the law.[34] The superior who by the Code may permit the alienation within certain amounts may not, without offending this provision of the Code, immediately allow the expenditure of the money obtained from the alienation. It is fundamental that only the supreme legislator may dispense from the general law. The words of the Congregation's decision are merely interpretative of the law. Canon 1531, § 3, is clear in requiring immediate investment, but the decision of the Congregation of the Council, which has the weight of considerable authority, though not universally binding, is even clearer still. Although at times a permission to alienate may be of little use to the local Ordinary if he is forbidden to expend the proceeds without the consent of the Holy See, yet there seems no other way out of the impasse. Any custom in opposition to Canon 1531, § 3, was abrogated by the Code.[35]

The principle of the Code is that the alienation and the subsequent investment of the money obtained remain bound together.

[33] Vermeersch-Creusen, *Epitome,* II, 853; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 285: "Pecunia censetur utiliter collocata si convertatur in aedes habitandas vel ad vetustam habitationem reparandam; non vero si adhibetur ad aes alienum extinguendum vel ad praedia melioranda."

[34] S. C. Conc., *Dioecesis N., Donariorum votivorum,* die 12 Jul., 1919—*A. A. S.,* XI (1919), 418: ". . . Servatis solemnitatibus in can. 1530-2, exquibus potissimum attendenda est clausula can. 1531, § 3: 'Pecunia ex alienatione percepta caute, tuto, et utiliter in commodum Ecclesiae collocetur'; *i. e.,* pecunia retracta non statim erogari valet in usus etiam pios et necessarios sed immo conservando est ad fructum; ut ergo erogetur seu consumatur (licet ad amplificandum ecclesiam) necessaria est semper Apostolicae Sedis licentia, seu dispensatio super obligatione hac, quam data lex in laudato canone perspicue et explicite, nullaque concessa exceptione, imponit."

[35] Kinane, "Alienation of Church Property," *IER,* XV (1920), 67, 239, 240.

There is the motive of preventing abuses that can arise on the part of superiors permitting expenditures of money obtained from alienation that have no definite limitations or which exceed these limitations, as for example the sale of a building alleging urgent necessity to avoid danger of usurpation, or to pay off debts. Vromant believes, however, that the revenue from alienation may be considered usefully invested when used to construct a dwelling or repair an old one badly in need of repairs, but not when used for general improvements or for building a church.[36]

In the investment of the proceeds of an alienation, the legislator recommends caution and prudence, in order to secure safety and profit, to avoid danger of loss, confiscation, or unjust taxation, and at the same time obtain reasonable returns. It is preferable that the investment be made in stable, profit-bearing possessions so as to give greater security and prevent any business dealings foreign to the clerical state. The question as to whether real estate or securitis, etc., are the better investments depends on the time and place.[37] It would seem in such a case, at least as a matter of prudence, that the administrator would need the advice of the Ordinary, of the diocesan board of consultors, and of the parties concerned.[38]

Investment may be considered in the wide and in the restricted sense of the term. The restricted sense is that relatively permanent conversion of these funds into other property for the revenue flowing from them, and regarded as the stabilized capital of the corporation. The conversion may be made into either immovable property, such as buildings, and lands, or incorporeal assets such as stocks, bonds, or securities in industrial or commercial companies, or in municipal, state, or federal governments.[39]

From restricted investment differs the investment considered in

[36] *De Bonis Ecclesiae Temporalibus,* n. 285.

[37] Kinane, "May Priests Invest Money in Industrial and Commercial Companies?", *IER,* XXXI (1928), 417-421; Vermeersch-Creusen, *Epitome,* II, 853: "Non raro tamen hodie prudentia coget ad collocandos pecunias in censibus aut titulis bancariis."

[38] *Cf.* Canon 1547; Ayrinhac, *Administrative Legislation,* p. 443.

[39] Vermeersch-Creusen, *op. cit.,* II, 853.

the wide sense of the word, which is not the permanent investment of the money but rather its deposit with some banking house, so that it may be more safely kept and meanwhile bear a certain interest.[40]

The Legitimate Superior for Alienation

A formality essential to every alienation of church property is the authorization of the legitimate superior. It is required under pain of nullity of the contract.[41] Canon 1532, which determines the superior from whom this authorization should come, profoundly modifies the Canon Law in force for the past several centuries.[42] From the fifteenth century, when the constitution *Ambitiosae* became law, until the Code, the *beneplacitum apostolicum* was necessary for all kinds of alienation except those of little consequence. The Code restores to the bishops some of the powers they had before the promulgation of the constitution *Ambitiosae*.

[40] Vromant, *op. cit.*, n. 176, II. It is not easy to define except in practice, whether in certain cases the investment should be made in the strict or in the wide sense. *Cf.* Chelodi, *Jus de Personis*, n. 260, c.: "Collocatio pecuniae est actus qui, si caute et tuto fiat, ordinariam administrationem non excedit." *Cf.* Vermeersch-Creusen, *Epitome*, II, 861: "Quidquid igitur sapit ludos bursarum et aleatores rationes emendi et vendendi cum lucro [*playing the stock market*], sedulo vitandum est."

[41] Canon 1530, § 1, n. 3—"[requiritur] licentia legitimi superioris, sine qua alienatio invalida est."

[42] C. 13, C. XII, q. 2; c. 9, X, *de his qui fiunt a praelato sine consensu capituli*, III, 10; c. un., *de rebus Ecclesiae non alienandis*, III, 4, in Extrav. Com.; S. C. S. Off. (*Sutchuen.*) 20 Aug., 1778—*Fontes*, n. 835; S. C. S. Off. (*Ratisbonen.*), 22 Dec., 1880, ad V—*Fontes*, n. 1068; S. C. Ep. et Reg., *Arminen.*, 7 Jan., 1579—*Fontes*, n. 1348; S. C. de Prop. Fid. (*C. P. pro Cochinchin.*), 27 Aug., 1832—*Coll.*, n. 827; S. C. de Prop. Fid. litt. (*ad Vic. Apost. Cochinchin*), 31 Mart., 1836—*Coll.*, n. 827 (nota 1); S. C. de Prop. Fid., instr. (ad Patriarch. Armen.), 30 Jul., 1867, n. 1—*Coll.*, n. 1310; S. C. de Prop. Fid. instr. (ad Praef. Ap. Norvegiae), 27 Maii, 1881—*Coll.*, n. 1553; S. C. Conc., *Medioianen.*, 14 Mart., 1682—*Fontes*, n. 2682; S. C. Conc., *Nullius Sublacen.*, 11 Maii, 13 Jul., 1782—*Thesaurus*, II, pp. 71, 97; S. C. Conc., *Anconitana*, 21 Apr., 1792—*Thesaurus*, LXI, 63-66; S. C. Conc., *Civitatis Castelli*, 15 Jun., 20 Jul., 17 Aug., 1793, ad I—*Thesaurus*, LXII, 178-182, 198, 200; *cf.* Reiffenstuel, lib. III, tit. 13, nn. 4, 17.

Canon 1532, § 1. "Legitimus Superior, de quo in Canon 1530, § 1, n. 3, est Sedes Apostolica si agatur: 1° de rebus pretiosis; 2° de rebus quae excedunt triginta millium libellarum seu francorum."

The wording of paragraph one of Canon 1532 is quite clear. Before the Code the *beneplacitum apostolicum* or permission of the Supreme Pontiff was a necessary preliminary to the alienation of all objects of church property except those of little or no value. Now, the authorization of the Roman Pontiff is to be obtained in certain limited cases. He retains control over only the more important alienations, leaving the others to the local Ordinaries. The "Holy See" in the meaning of the canon signifies practically the various congregations. Thus, for alienation of parochial property, the Ordinary or administrator should submit the request to the Sacred Congregation of the Council; for diocesan property, the Ordinary should forward the petition to alienate to the Sacred Consistorial Congregation.[43]

1°. "De rebus pretiosis:"

When there arises a question of alienating precious objects the Holy See alone can grant permission to alienate. It will be kept in mind that these "objects" mentioned are church property, the possessions of a canonically erected moral person.

In law, not all things or goods made of precious metal can be said to be precious objects, nor inversely can it be said that things of coarse or cheap material are not necessarily precious objects. The canonical definition of precious objects is to be found in Canon 1497, § 2, which says that goods are to be regarded as precious when the value is considerable either because of the artistic, his-

[43] *Cf.* Vermeesch-Creusen, *Epitome,* II, 854; Pejska, *Jus Canonicum Religiosorum,* p. 71. The Sacred Congregation for Seminaries and Universities is competent to grant permission to alienate seminary property; the Sacred Congregation for the Propagation of the Faith is to be addressed for permission to alienate land or goods in mission territory. The Holy See may always, of course, be addressed directly for permission.

torical or material worth.[44] The most important point is that the object should be of notable worth, otherwise it cannot juridically be considered as precious. The Sacred Congregation of the Council was asked whether the *beneplacitum apostolicum* was necessary for the alienation of all precious objects, or whether it was not possible for Ordinaries to permit alienation of these objects within certain limited sums. The congregation, not wishing to touch this question, replied that it was to be submitted to the Pontifical Commission for the Authentic Interpretation of the Canons of the Code. The Commission, however, has not as yet pronounced on the proposed doubt. At any rate, "considerable value" is to be understood not abstractly and theoretically, but according to a commercial estimation of the object, in other words, an objective appraisal made by the competent experts referred to in Canon 1530, § 1, n. 1. Therefore, other means of estimation must be excluded, such as a subjective appraisal resulting from the friendship between buyer and seller, or a purely accidental value resulting from a high bid at auction.[45]

In the meaning of the Code, *valor notabilis* may be judged from the artisitic fabrication or ornamentation of the object, as for example, paintings, vestments, vessels, statues, candelabra, and so on. The historical importance of the object also determines its value, whether it be an important historical document or a monument with an historical past. Notable material value such as found in precious jewels, etc., is self-evident. The "considerable value" as understood by the canon is determined by quality and not by quantity, except in cases where these objects have considerable value only as forming a collection. The examples cited are an attempt

[44] Canon 1497, § 2: "(Bona dicuntur) pretiosa, quibus notabilis valor sit, artis vel historiae vel materiae causa." *Cf.* S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 417.

[45] S. C. Conc., *Lauden.* (Lodi), 14 Jan., 1922, ad I: "Dubium: Utrum ad alienationem rerum utcumque pretiosarum semper necessarium sit beneplacitum apostolicum an possit Ordinarius intra certos summae limites huiusmodi alienationem permittere. Resp.: Ad Pontificam Commissionem pro Canonibus authentice interpretandis."—*A. A. S.,* XIV (1922), 160, 161. *Cf.* De Meester, *Compendium,* III, 1446.

to illustrate. There is not much point in discussing whether the definition of precious objects by Canon 1497, § 2, is demonstrative or taxative, since the definition already appears to be completely exhaustive.[46]

In defining *valor notabilis* a 1919 rescript of the Sacred Congregation of the Council warns not to exaggerate or minimize.[47] In order that an object be termed "precious" or of "considerable value" it is not enough that it be made of costly material and possess a certain artistic and historical value if in the end the commercial price is small. But on the other hand, an object may and can be called precious according to the meaning of the law even where its price does not exceed thirty thousand lire or francs or about six thousand dollars. Its price may be far less than that. In fact, the *votum consultoris* in the decision of the Congregation points out that it is a sound opinion that any object of artistic, historical or material worth, whose value is above one thousand francs or lire, or about two hundred dollars, may be safely considered as a precious object.[48]

[46] *Cf.* Oesterle, *Praelectiones Juris Canonici,* I, 179.

[47] S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 417; Chelodi, *Jus de Personis,* n. 261, nota 6: "Definitio rei pretiosae ad normam, c. 1497, § 2, omnia dubia non excludit."

[48] S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 417, 418: "[D'Annibale] sic referebat authenticam aestimationem Romanae Curiae saec. XVII: 'Porro mobilia pretiosa accipimus vasa aurea vel argentea, gemmas, etc., et quae vel antiquitate praestant vel artificio, dummodo valeant saltem 25 aureis de Camera (lib. 235)'; probati vero scriptores nostrae aetatis monent attendi posse ad mutatem valorem pecuniae. Quem duplo vel triplo minorem aestimabat Wernz (*Jus Decretalium,* t. III, n. 160, not. 140). Quare valor iste tutissime ad 750 lib. in Curia hodie defineri potest. Nec desunt qui notabilem valorem infra mille lib. esse hodie negent; immo ipse Canon 1532, § 2, dum alienationem distinguit rerum quae 1000 lib. attingunt et quae 1000 lib. superant, hanc aestimationem quae simplicitate quoque commendatur, ratam habere videtur"; De Meester, *Compendium,* III, 1487; Cappello (*De Censuris,* 406) considers that any value lower than one thousand lire cannot be considered a notable value. Such is also the opinion of Génicot-Salsmans, *Institutiones Theologiae Moralis,* II, 612; Cocchi, *Commentarium,* III, 169; Raus, *Institutiones Canonicae,* n. 237; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 36.

Votive offerings, even when not precious within the meaning of the canon, must be likened to precious objects.[49] They cannot be alienated without Papal authorization even if they are of very small value, and even though the donor subsequently consents to their alienation.[50]

2°. "De rebus quae valorem excedunt triginta millium libellarum seu francorum."

The Holy See likewise reserves to itself the permission to alienate goods of the Church which exceed in value the sum of thirty thousand lire or francs, or about six thousand dollars. The authorization of the Holy See is also essential for the alienation of several pieces of property sold or otherwise burdened at the same time by the same church corporation, exceeding thirty thousand lire or francs in total value.[51] Here there is no concern about the quality of the object as shown in regard to precious goods. The monetary value is the sole consideration. There is no distinction between movable and immovable property. The only consideration is that it be susceptible of continued use.[52]

First, let it be noted that the price limit set here by the Code is that computed by competent experts, not the sentimental value

[49] S. C. Conc., *Lauden.* (Lodi), 14 Jan., 1922, ad 4 um: "Dubium: Utrum mera oblatio doni ad altare vel ad sacram iconem, praesumptionem voti secum ferat, an positive constare debeat donarium ex voto oblatum esse. Resp.: Donarium praesumi votivum nisi de contraria donatoris vel offentis voluntate aliunde constet"—*A. A. S.,* XIV (1922), 160, 161.

[50] S. C. Conc., *Donariorum votivorum,* 12 Jul., 1919—*A. A. S.,* XI (1919), 416-418; S. C. Conc., *Lauden.* (Lodi), 14 Jan., 1922, ad II: "Dubium: Utrum ad alienationem quorumcumque donariorum votivorum requiratur beneplacitum apostolicum, an possit Ordinarius de eisdem disponere, intra certam summae quantitatum. Resp.: Affirmative ad primam partem; negative ad alteram." Ad III: "Dubium: An ad alienationem donariorum votivorum requiratur beneplacitum apostolicum, quando ipse oblator donarii in alienationem ultro consentiat. Resp.: Affirmative"—*A. A. S.,* XIV (1922), 160, 161. *Cf.* De Meester, *Compendium,* III, 1487.

[51] C. I. C., 20 Jul., 1929, ad 5—*A. A. S.,* XXI (1929), 574.

[52] Canon 1530, § 1—"res ecclesiasticas immobiles aut mobiles, quae servando servari possunt"; Oesterle, *Praelectiones Juris Canonici,* I, 179.

set on the property by the owner, nor the actual price obtained at auction.[53]

Secondly, the Papal permission need not be sought if the amount of the proposed alienation just reaches the limit of thirty thousand lire or francs. The amount must actually exceed this limit.

In stating the sum which requires the *beneplacitum apostolicum* for transacting alienations and contracting debts, those monies are cited which are founded on the more common decimal system and indicated by the general name of "lira" or "franc." They indicate the amount as exactly as the general law can, and in principle are to be reduced to terms of dollars, pounds, etc., not approximately but as closely as possible. However, since the war the purchasing power of money varies greatly according to the different countries. Various authors have inquired as to whether the lire or francs mentioned in the Code were to be understood in their gold content, or in the current exchange rate. The Holy See thus far has not chosen to settle the point, and all documents emanating from the Sacred Congregations scrupulously avoid touching upon it. The principle set down by the authors is that gold money is the only solid and workable basis that exists. Consequently, all the other monies are to be computed in relation to the lira and franc on their respective gold parities. One cannot be concerned with the actual gold content of the money, but must go back to the established rates of the gold standards referred to as the *convenzione latina*. The Holy See has not reproved this principle and in practice has allowed it to stand.[54] At the present

[53] C. I. C., 24 Nov., 1920: "Dubia soluta ab Eminentissimo Praeside Commissionis Interpretationis Codicis (24 Nov., 1920); De alienatione rerum ecclesiasticarum: 1° Utrum pretium de quo in canonis 1532, § 3, idem sit ac valor rei secundum aestimatione a probis peritis factam ad normam canonis 1530, § 1, n. 1; an vero maius pretium per publicam licitationem, etc., oblatum ad normam canonis 1531, § 2, 2°. An requiratur Apostolicae Sedis beneplacitum ad alienationem peragendam, si, indicta licitatione, pro pretio a peritis legitime taxato, infra libellarum triginta millia. Offeratur tandem pretium hac summa superius. Resp.: Ad I: Affirmative ad primam partem, negative ad secundam. Ad II: Provisum in responsione ad primum"—*A. A. S.*, XII (1920), 577. *Cf.* Claeys-Bouuaert-Simenon, *Manuale Juris Canonici*, n. 1921.

[54] Vermeersch-Creusen, *Epitome*, II, 854; Pruemmer, *Manuale Juris Canonici*, p. 260, n. 1; Chelodi, *Jus de Personis*, n. 261, nota 7.

moment this seems the only practical basis upon which to work. Otherwise, one would continually be exposed to the fluctuations of modern currency exchange rates. The Church would quite conceivably run grave risks of being defrauded of her property. For want of an authentic pronouncement of the Holy See, the only practical solution is to consider the franc, the lira and the dollar, as in our case, on their former gold ratios: five lire or five francs to the dollar.[55]

Absurd and vicious inequalities, and continued uncertainties arise from an interpretation of the franc and the lira in terms of current exchange rates. In fact, the quotations are subject to change from day to day. So that property which one day could be alienated without permission from the Holy See, would require it the next. The illustration does not seem strained. An alienation requiring Apostolic permission in one country, could conceivably be a matter solely of episcopal consent in another nation. The Code is universal and constant legislation, and ought necessarily, when it speaks in terms of money, have in mind a unit which has a universal and fixed rate. Moreover, it is certain, as appears from the process of the codification [56] that the Holy See wishes to establish limits within which, without necessitating continuous recourse to it, Ordinaries might provide for the demands of administration. Using the present currencies as a basis, this would be impossible. Unstabilized money is not a true basis upon which to work. Therefore, for practical purposes, and until such time as the Code Commission pronounces definitely on the subject, the round number of five lire or francs to one dollar can be used in all computations.[57]

[55] Blat, *Commentarium,* III, 584: "In his ergo nummis vel aequipollentem summam, ac propter particulam 'seu' disjunctivam non considerato variabili cambii lucro in diversorum nummorum comparatione, etiam respectu valore pecunia." Vermeersch-Creusen, *Epitome,* I, 657; De Meester, *Compendium,* III, 1446; Cappello, *De Censuris,* n. 408; *Periodica,* XII (1923), 154: "Valor . . . secundum nominalem relationem (sic est praxis S. Sedis) ad alias pecunias, valor in aliis regionibus erit aestimandus . . . Itaque, 100,000 francorum adaequabatur in America 20,000 dollari."; Oesterle, *Praelectiones Juris Canonici,* I, 279; Chelodi, *Jus de Personis,* n. 261, nota 7.

[56] A. Larraona, "Commentarium Codicis," *CpR,* XIV (1923), 43.

[57] Chelodi, *Jus de Personis,* n. 26, nota 3. "Ulterius quaeritur: utrum haec summa sit computanda in moneta aurea quae representat valorem realem an

Canon 1532, § 2. "Si vero agatur de rebus quae valorem non excedunt mille libellarum seu francorum, est loci Ordinarius, audito administrationis consilio, nisi res minimi momenti sit, et cum eorum consensu quorum interest."

If the value of the object of Church property to be alienated does not exceed a duly appraised value of one thousand lire or francs or about two hundred dollars, the Code grants to the local Ordinaries the faculty of authorizing the alienation. As a general rule, the authorization is valid only when given after consultation with the council of administration and upon consent of the parties concerned.[58] If, however, the object is of little importance—*minimi momenti*—the consultation with the council of administration is not required, and the bishop can validly permit the alienation solely with the consent of the parties concerned.

Inversely, in accordance with Canon 1530, § 1, n. 3, the permission of the bishop is necessary for the validity of alienations of church goods even lesser in value than one thousand lire.[59] The Code states plainly, and without any qualifications, that the permission of an ecclesiastical superior is necessary for a valid alienation. The legitimate superior who grants the permission for the alienation of church goods ranging in value from two hundred dollars and down, is, in this instance, the local Ordinary.[60] Even when the alienation contemplated is of very minor consequence and the parties concerned are entirely willing, the actual alienation cannot validly take place with-

in moneta papyracea, quae non est nisi titulus crediti, non vera moneta—Prima sententia probabilior apparet; at S. C. Concilii an. 1922 in causa *'Lauden.'* de hac re interrogata noluit rem definire, sed eam remisit ad Commissionem Pontificiam ad Codices canones interpretandos quae hucusque quaestionem non solvit"—De Meester, *Compendium,* III, 1446; the same opinion is adopted by Cappello, *De Censuris,* n. 408; Vermeersch-Creusen, *Epitome,* II, 819; Claeys-Bouuaert-Simenon, *Manuale,* n. 989; Vromant, *De Bonis Ecclesiae Temporalibus,* nn. 36, 287.

[58] Cc. 3, 8, X, *de his qui fiunt a praelato sine consensu capituli,* III, 10; Schmalzgrueber, lib. III, tit. 13, n. 96.

[59] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 288.

[60] This dissertation does not consider the law of alienation for Religious.

out the previous permission of the bishop. The administrator of ecclesiastical temporalities is merely an administrator. His office does not carry with it the right of disposal and the general law does not grant the right to him.

Before the Bishop can grant permission for such alienations, it is necessary that he have a consultation with the council of administrators of his diocese.[61] He is in no way obliged to follow their decision even if it is unanimous, though here he should not depart from their counsels unless he has his reasons, and he is the judge of his own reasons. Therefore, it is sufficient for the validity of his acts that he hear what the council has to say, but he cannot validly dispense with this consultation.[62]

The consultation with the council of administration is not required for the validity of the authorization if the object to be alienated is of little importance. In what circumstances might an object be said to be *minimi momenti*? In the absence of further precisions in the text, the determination of this factor seems to rest with the bishop. In each individual case, his appraisal should take into account not only the pecuniary value or commercial price, but also the relative value, the importance or utility which it may represent to the moral person requesting its alienation.[63] The text of the canon, as a matter of fact, does not say *minimi pretii* or *minimi valoris* but *minimi momenti* which is quite different.[64]

The consent of the persons concerned must be obtained for all alienations requiring episcopal permission. These interested parties

[61] *Cf.* Canon 1520, § 3; also Canons 1538, 1539, § 2; 1541, § 2; 1542, § 1.

[62] Canon 105, n. 1. *Cf.* Vermeersch-Creusen, *Epitome,* I, 229, for a detailed discussion of Canon 105. Vromant, *De Bonis Ecclesiae Temporalibus,* n. 228, says: "Saltem ad liceitatem audire debet Consilium administrationis." Canon 105, n. 1, seems quite clear, however: "Si consilium tantum [exigatur] . . . satis est ad valide agendum ut Superior illas personas audiat." For liceity the bishop may not act against the unanimous decision of the council unless he has prudent reasons for doing otherwise; for validity he must at least hear what his council has to say.

[63] A. Couly, *Dictionnaire de Droit Canonique,* "Aliénation."

[64] Pejska, *Jus Canonicum Religiosorum,* p. 72: "Minimi momenti: cuius pretium 225 francos [$45] non superat"; Pennachi, *Commentaria in Constitutione "Apostolicae Sedis,"* I, 148.

may be, for example, the possessor of the benefice, the patron of the church fabric, and so on, where such an arrangement exists.[65] In the event that the party concerned should happen to be a collegiate moral person, each member must approve, where the alienation touches each[66] An alienation performed without the consent of the interested parties, in the sense understood by the canon is invalid.[67]

Canon 1532, § 3. "Si denique de rebus quarum pretium continetur intra mille libellas et triginta millia libellarum seu francorum est loci Ordinarius dummodo accesserit consensus tum Capituli Cathedralis, tum Consilii administrationis, tum eorum quorum interest."

It still lies within the power of the bishop to grant permissions for alienation of church property not exceeding thirty thousand francs or lire, or about six thousand dollars in value. The bishops of the United States and Canada, however, have obtained quinquennial faculties through the Sacred Congregation of the Council, permitting the alienation of ecclesiastical goods to the sum of ten thousand dollars. At the same time the bishops of South America, "and other regions" have obtained such faculties extending to fifteen thousand pesos. These faculties are to be used only in a case of necessity and when there is not sufficient time for recourse to the Holy See. Moreover, the Holy See must be notified immediately upon completion of the alienation.[68]

Besides these episcopal faculties, Papal Nuntios, Internuntios and Apostolic Delegates have likewise been conceded certain extended

[65] Canons 1184 (consilium fabricae), 303 (consilium missionis); Vromant, *De Bonis Ecclesiae Temporalibus,* n. 289; Vermeersch-Creusen, *Epitome,* II, 854.

[66] Canon 101, § 1, n. 2.

[67] Canon 105, n. 1.

[68] S. C. Conc., 22 Nov., 1934: *Facultates Quinquenniales (ex Decreto S. Cong. Consistorialis,* 17 Mart., 1922, III, n. 5), Formula IV, n. 5: "Permittendi alienationem bonorum ecclesiasticorum usque ad summam capitalem 10,000 dollariorum pro Statibus Americae Foederatis et ditione Canadensi; et 15,000 pesos pro America Meridionali allisque regionibus; hoc vero quatenus necessitas adsit et tempus non suppetat recurrendi ad S. Sedem, edocta, statim ac effecta fuerit alienatio eadem S. Sede de alienatione ita peracta."

faculties following the publication of the Code. In their own particular jurisdiction, whenever urgent necessity, evident utility, and danger in delay shall dictate, they have the faculty to permit the alienation of property belonging to the Church up to the sum of sixty thousand francs for Europe, and one hundred thousand francs or its equivalent for the United States, Canada and other nations outside of Europe.[69]

If the value of the object of church property to be alienated is more than one thousand lire or about two hundred dollars in value, and below the upper limit, the combined consent of the cathedral chapter, the council of administration and the parties interested must be obtained by the Ordinary before he can give his own consent.[70]

The authorization of the local Ordinary, or the one who takes his place, is always necessary for validity, whatever the importance of the alienation. Besides the Roman Pontiff, the term of "local Ordinary," for the purposes of this dissertation, includes residential bishops in their own territories, Prelates *nullius* and their vicar generals, administrators, vicars, and prefects apostolic, as well as pro-vicars and pro-prefects apostolic when there is no vicar or prefect or when the latter is hindered from exercising his jurisdiction.[71]

By virtue of his office, the vicar general has the same jurisdiction over diocesan temporalities as the bishop has by common law. There is no special mandate required by the canons for the matter of alienation, and therefore, unless the bishop shall reserve the power to himself, the vicar general can also grant permission to alienate. The extraordinary faculties granted to bishops also extend to their vicars

[69] *Periodica,* XII (1923), 154: Index facultatum quas, pro locis missionis suae, Nuntiis, Internuntiis et Delegatis Apostolicis penes civitates seu nationes post Codicis Juris Canonici publicationem tribuere SSmus Dominus Noster decrevit, ceteris abrogatis—Recentiores Facultates, die 21 Junii, 1920, iisdem Pontificiis Administris a S. C. Consistoriali concessae; n. 2: "Quoties urgeat necessitas, evidens sit utilitas, et periculum sit in mora, facultas conceditur permittendi alienationes bonorum ecclesiasticorum vel piarum causarum usque ad valorem 60 millium fr. pro regionibus Europae, et 100 millium extra Europam."

[70] Cc. 1, 3, 8, 9, X, *de his qui fiunt a praelato sine consensu capituli,* III, 10.

[71] Canon 198.

general unless some particular clause in the concession shall prevent it.[72]

When the value of the proposed alienation ranges between one thousand and thirty thousand lire or francs, or, in this country, between about two hundred dollars and the limit of ten thousand dollars accorded in the latest indults, the consent of the cathedral chapter is necessary for validity. In dioceses where there is no cathedral chapter the board of diocesan consultors takes over the duties of the chapter.[73] The chapter is to be convoked and must act upon the question in a body. It does not seem, however, that the unanimous consent of the board is required for validity, but rather the majority consent, the bishop's vote included.[74]

The same holds true in regard to the council of administration; their consent must be had for validity. Their convocation is necessary, and they must act in a body. This is the general rule for both the diocesan board of consultors and the council of administration, as contained in Canons 101, § 1, n. 1, and 105, n. 2. However, by reason of great distances and difficulty of convocation, Canon 302 permits the Ordinaries of mission territories to dispense with the convocation of the consultors and administrators and rather seeks their advice or consent by letter. Furthermore, in these same mission territories, a church corporation may require an agent, representative, or proxy, to transact its business in some distant city without easy contact with the Ordinary. Vromant [75] affirms that although the representative may not presume the permission of the Ordinary for alienation, yet there seems nothing to prevent the Ordinary from

[72] Canons 368, 66, § 2.

[73] Canons 423, 427. The word "dummodo" in paragraph three of Canon 1532 signifies a condition of validity. Vermeersch-Creusen, *Epitome,* II, 854; De Meester, *Compendium,* III, 1487: "Uti ex apposita voce 'dummodo' constat, consensus praedictorum omnium hac in hypothesi certe requiritur ad valorem."

[74] Canon 105, n. 2; can. 101, § 1, n. 1; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 290: "Odiosa stricte sunt interpretanda"; *Reg. Jur.* 38, in VI°: "Quae a jure communi exorbitant nequaquam ad consequentiam sunt trahenda." *Cf.* Vromant, *op. cit.,* n. 290, for the mission territories; *cf.* Canons 391, § 1; 430, § 3, n. 1, 431, etc., in the vacancy of the Episcopal See.

[75] *De Bonis Ecclesiae Temporalibus,* n. 290.

granting a general permission, with the consent of the board of consultors and the council of administrators, or upon consultation with the council of administrators as the case may be. A definite time limit is to be set and the condition imposed of obtaining a special permission in the case of a particularly important alienation.[76]

Whenever it so happens that the board of consultors and the council of administration are divided on the question of the advisability of a proposed alienation, it is not within the power of the Ordinary to supply the consent of either or both. Canon 105, n. 1, states definitely that when the consent of certain persons is required for the validity of an act, to proceed without having actually obtained that consent is to act invalidly. If in the prudent judgment of the Ordinary it appears that the necessary consent is withheld without just reasons, he has a remedy in a recourse to the Holy See, but of his own power he can do nothing.[77]

In all matters of alienation of church property where the Ordinary is authorized to grant permission, the consent of the parties concerned in the transaction must be signified before the alienation can be considered validly performed. When the legitimate ecclesiastical superior for permission is the Holy See, there is no mention made of this requirement. The Holy See, having supreme authority over all church property, is not dependent on this consent any more than on that of the diocesan consultors or administrators.[78] As has been said above, when the consent of the parties concerned is demanded, the consent of one or the other of them cannot be supplied by the Ordinary.[79] The interested parties are, for example, the beneficiaries enjoying the fruits of the particular property to be

[76] *Cf.* Vermeersch-Creusen, *Epitome,* II, 854.

[77] S. C. Conc., *Lauden.* (Lodi), 14 Jan., 1922, ad V: "Dubium: An in Ordinarii facultate sit, quando Consilium administrationis et Capitulum cathedrale inter se dissentiant, supplere alterutrius consensum, tum in negotio alienationum, tum in quovis aequipollenti contractu. Resp.: Negative."—*A. A. S.,* XIV (1922), 160, 161; Animadversiones in h. decis.—*JP,* II (1922), 57; De Meester, *Compendium,* III, 1487.

[78] Canon 1499, § 2.

[79] Vermeersch-Creusen, *Epitome,* II, 854; Canon 101, § 1, n. 2: "Quod autem omnes, uti singulos, tangit, ab omnibus probari debet."

alienated, the representatives of the moral person owning the property, etc. In the American system of holding church property, these last-mentioned representatives are the officers of the religious corporation in whatever form it may be incorporated under the statutes of its own state.[80]

Centenary and immemorial customs contrary to these provisions of the Code are tolerated if the Ordinary considers that they cannot prudently be discontinued, due to peculiar circumstances of place and persons. All other customs must be regarded as suppressed.[81]

Canon 1532, § 4. "Si agatur de alienanda re divisibili, in petenda licentia aut consensu pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est."

Paragraph four of Canon 1532 foresees the case of an alienation of divisible property in which the parts are alienated successively. A large estate is divided and parcels of the land are sold one after the other. The total valuation of the estate is around fifty thousand dollars, but none of the sections are individually worth more than six or eight thousand dollars. It is possible, and this would certainly be the most frequent case, that the administrators in making successive sales of section of the same estate would act without the slightest thought of the estate as a whole, and certainly without any fraudulent intention. Yet it could also happen that they wish to avoid a check on their activities, either by the council of administration or by the board of consultors, or that under pretext of simplification they seek to avoid recourse to the Holy See. At any rate, the legislator sees in this method of procedure, a danger for the church corporation which, little by little, piece by piece, finds itself despoiled of property which may have been very useful to it. Each alienation, in the example cited, is not of great importance, but added to those before it, threatens to end in a notable impoverishment for the ecclesiastical moral person that must be prevented and even avoided. That is why the legislator rigorously obliges administrators to make known in their

[80] For details, see below, chapter eight.

[81] Canon 5.

petitions any parts of the property that have already been alienated. The analogy of landed property is to be extended to all kinds of church property having physical as well as moral unity. This paragraph of the canon commands the observance of the three previous paragraphs, and good faith on the part of the administrators must be taken into account.[82]

When several parts of the same divisible property are sold at the same time and their value exceeds thirty thousand lire or francs, the permission of the Holy See is required. It is, of course, indispensible when the whole of this same divisible property is sold at the one time. Likewise, when several pieces of church property, in themselves distinct from each other and totaling more than thirty thousand lire or francs are to be alienated at the same time, the *beneplacitum apostolicum* must be obtained. According to a decision of the Pontifical Commission for the Authentic Interpretation of the Canons of the Code on this point, two conditions are required: (1) that the several items of property are alienated as one group, *e. g.*, an inheritance, including buildings and land, to an ecclesiastical moral person which this moral person wishes to alienate in one and the same act; (2) that all these items belong to the same juridical ecclesiastical person.[83] The clause *per modum unius* of the decision means that the different pieces of property in question are for example sold, mortgaged, given in security, or otherwise alienated to the same buyer, or several buyers acting in concert, and in one and the same contract of alienation. Therefore, the permission of the Holy See is not necessary when the items to be alienated do not exceed the amount of thirty thousand lire or francs and are sold to different buyers, or to the same buyer in different contracts. The decision would apply even less if at different times several pieces of church property were alienated successively for different purposes, though their total value exceeded thirty thousand lire or francs. Furthermore, if several of the said items of property

[82] Vromant, *De Bonis Ecclesiae Temporalibus*, n. 293; Vermeersch-Creusen, *Epitome*, II, 854.

[83] C. I. C., 20 Jul., 1929, ad V: "Dubium: An vi canonis 1532, § 1, n. 2, requiratur licentia S. Sedis ad alienandas per modum unius plures res ecclesiasticas eiusdem personae, quae simul sumptae valorem excedunt triginta millium libellarum seu francorum. Resp.: Affirmative."—*A. A. S.*, XXI (1929), 574.

are sold to the same buyer through the agency of a common procurator or diocesan administrator, but are the possessions of different ecclesiastical moral persons, then the items must be regarded singly, the property of each individual moral person, in order to determine the value so as to decide whether the *beneplacitum apostolicum* is necessary or not in each case.[84]

[84] Maroto, "Animadversiones" in h. decis.—*Apollinaris,* III (1930), 241, 242; *idem.*—*CpR,* X (1929), 342, 343; Cappello, "Animadversiones" *Periodica,* XVIII (1929), 256-259.

CHAPTER V

CONTRACTS OF ALIENATION

In order to avoid confusion it has been deemed more practical to treat of the particular aspects of certain contracts of alienation in a separate section. However, it is not within the scope of this monograph to enter into any considerations on the origin and development of contracts. All remarks will be confined rather to pointing out any special marks that must be noted in contracts as they are understood at present, both in the canon and civil law. The following forms of contract considered are contracts of alienation proper, contracts which transfer direct ownership over property.

Contract of Sale

Sale is a censensual and bilateral contract by which one of the parties transfers or agrees to transfer the ownership of a thing for the consideration of a price which the other party obligates himself to pay. Sale is a contract plus a transfer of property. The sale grants a right over a thing—*jus in rem*—while the agreement to sell grants a right over a person—*jus in personam*. The essence of a sale is the transfer of property for a price.[1]

An attempt at uniformity in the laws of the various States of the Union has been begun by means of a Uniform Sales Act [2] which concerns the nature of the seller's obligation with reference to the kind and quality of the goods sold. If the seller has undertaken any obligation in this respect, the buyer, in the majority of the States, will be entitled in case of breach, not only to damages but also to return the goods and recover the price.[3]

In general, the power of a church corporation to dispose of its own property will depend upon the conditions, if any, under which it is

[1] *Uniform Sales Act*, § Contract to Sell.

[2] By 1928 it had been adopted in twenty-eight of the States.

[3] Williston, *The Law of Contracts*, § 506.

held. "It is elementary that a sale in breach of such conditions will work a forfeiture of the title to the original owner. Similar reasoning has also been applied to land held under an express or implied trust, though the weight of authority, in cases where the property has become inconvenient or useless, favors the practice of allowing the sale and attaching the trust either to the proceeds or to the property acquired with these proceeds."[4]

Though a church corporation possesses within itself full power to dispose of its property, this power will not be considered so unlimited that it will not be bound by a contract which it has legally entered into and which it will not be allowed to break. In the absence of any such valid contract, the church corporation has perfect and full right to alienate its property by sale as it sees fit, and all such alienations will be approved by the courts.[5] Good faith in the administrators of the corporations is a necessary element in all sales. Where the permission of the bishop is necessary to be obtained before the particular corporation may alienate, the courts, if necessary, will force the observance of the permission.[6]

Many of the States prescribe by statute certain forms of deeds which may be used in transfering real property. These deeds are more in the nature of suggestions than of absolute requirements. There is a general recognition of the common-law forms of conveyance, which is by deed, either warranty or quit-claim. While it is possible that the briefest expression of an intention to convey land, described, signed, sealed, acknowledged, and delivered by a party would be sufficient, yet few are willing to take property unless the deed fulfills the general formal requirements, and it is unwise to depart from the accepted practice. It is useful to divide the

[4] Zollmann, *American Church Law* (St. Paul, 1933), n. 176; *cf.* numerous cases cited.

[5] Mason v. Muncaster (1821), Fed. Cas. No. 9, 247, 2 Cranch. C. C. 274; affirmed 22 U. S. (9 Wheat.) 445, 6 L. Ed. 131; Eggleston v. Doolittle (1866), 33 Conn. 396; Trustees of the Catholic Cathedral Church of Baltimore v. Manning (1890), 72 Md. 116, 19 Atlantic 599.

[6] Lane v. Rector, etc., of Calvary Church of Summit (1900), 59 N. J. Eq. 409, 45 Atlantic. 702; Rector, etc., of Church of St. Bartholomew v. Wood (1876), 80 Pa. 219.

parts of a deed into the premises, the habendum, conditions, warranty, and covenants.[7]

After the deed is acknowledged it is sent to the recorders' office for recording. The object of recording is to give constructive notice of the conveyance to all subsequent purchasers and creditors. A deed is effectual between the immediate parties although unrecorded.[8]

In short, sale of properties is one of the principal modes of alienation which must abide by the general rules of the Code. Moreover, Canon 1534, § 1, rules that in the event of the sale of sacred things, no account of their benediction or consecration should be taken into consideration in estimating the value.[9] Likewise the immovable property of an ecclesiastical person is not to be sold to the administrators of this property or to their relations in the first or second degree of consanguinity or affinity, unless special permission of the bishop has been obtained.[10]

Contract of Exchange

Exchange is a consensual and bilateral contract by which the parties give or furnish each other respectively, one thing for another. It differs from the contract of sale in that a price is lacking.[11]

In the matter of legislation in the United States on the contract of exchange, the preparation in 1897 of the Uniform Negotiable Instruments Act, or Bill of Exchange, and its adoption by 1927 by all the States without substantial change has brought uniformity into the statutes.[12]

The Code rules that in the exchange of sacred things there

[7] Robinson, *Elementary Law*, nn. 129-134.

[8] *Cf.* Judge Morton, in Morse v. Curtis, 140, Mass. 112.

[9] This would be simony by divine law: ("Simonia juris divini," Canon 727, § 1): Nevertheless, "non habetur simonia . . . cum datur res temporalis pro re temporali, quae tanquam subiectum habeat annexum aliquid spirituale, ex. gr., calix consecratus dummodo pretium non augeatur propter annexam rem spiritualem"—Canon 730.

[10] Canon 1540.

[11] Robinson, *Elementary Law*, n. 130.

[12] *Cf.* Williston, *The Law of Contracts*, I, § 510.

should be no consideration taken of their benediction or consecration, in estimating the price.[13] Administrators may exchange notes payable to bearer against notes presenting an equal if not a greater amount of security bearing a like or better rate of interest. The consent of the bishop of the diocesan council of administration and of the interested parties is a necessary preliminary. The Code counsels administrators in this respect, to refrain scrupulously from all semblance of barter or speculation.[14]

Contract of Donation

A contract of donation not *mortis causa* is an act by which the donor actually and irrevocably gives over a thing in favor of the receiver who accepts it.[15]

Prelates and rectors of churches are only administrators of the property belonging to the churches or establishments that they direct or govern. According to the common law of the Code they cannot give either the property which forms a part of the stable patrimony of the moral person without the authorization required for alienation, nor even the belongings of little importance which are not capitalized. If they do so, the donation can be revoked by their successors.[16] There are, however, two exceptions to the foregoing principle: small gifts of non-capitalized movable property are not forbidden provided they are justified by legitimate local customs; more important donations may be made for a just motive such as that of remuneration, piety or Christian charity, but if the object of these donations is any part of the capitalized property of the corporation, the prescribed rules for alienation must be followed.[17]

Until proof of the contrary, gifts made to rectors of churches are presumed to be made to the church corporations.[18] It is not

[13] Canon 1539, § 1.

[14] Canon 1539, § 2.

[15] Vermeersch-Creusen, *Epitome Juris Canonici,* II, 857.

[16] *Cf.* Vromant, *De Bonis Ecclesiae Temporalibus,* nn. 319, 320.

[17] Canon 1535; *cf.* Claeys-Bouuaert-Simenon, *Manuale Juris Canonici,* n. 1024, sq.; Cocchi, *Commentarium in C. I. C.,* n. 219.

[18] Canon 1536, § 1.

permissible for the rector of a church, the superior of an establishment, a director of a work, etc., to refuse a donation without permission of the bishop.[19] The refusal of a donation is valid, although illicit. The one who refuses, however, by reason of the wrong occasioned, may be the object of an action of *restitutio in integrum*, by which he may be compelled to accept what he at first refused,[20] and of an action for indemnity.[21] A donation made to an ecclesiastical moral person and legitimately accepted by it cannot be revoked for cause of ingratitude on the part of the prelate or the rector who is the administrator of this moral person.[22] If the donation is important, it may be partially revoked, in case where children are born to the donor, and their legal reserve is in jeopardy.[23]

Contract of Loan

The contract of loan which may be classified as a contract of alienation proper is that loan wherein the ownership of property is actually transferred, and repaid in kind. *Mutuum*, or loan for consumption, is not to be confused with loan for use, or *commodatum*. The contract of loan for consumption or simple loan is a real contract whereby one of the parties delivers to the other a thing consumable by first use, as, for example, money, which becomes the property of the borrower, with the obligation for the latter of repaying in the same kind and quantity. If there is an express stipulation that the borrower shall pay interest, the contract takes the name of loan at interest.[24]

[19] Canon 1536, § 2; *cf.* Vermeersch-Creusen, *Epitome*, II, 857.

[20] Vromant, *De Bonis Ecclesiae Temporalibus*, n. 323, 1, 2.

[21] Canon 1536, § 3; *cf.* Claeys-Bouuaert-Simenon, *Manuale*, III, n. 289; Vromant, *op. cit.*, 326, 2: "Haec indemnitas ex bonis quoque personalibus Praelati vel Superioris, pro necessitate, praestanda erit, nisi hic cum consensu Consilii vel Capituli egerit."

[22] Canon 1536, § 4.

[23] Vermeersch-Creusen, *Epitome*, II, 857.

[24] *Cf.* Robinson, *Elementary Law*, n. 164 (contract of bailment).

In conformity with the traditional doctrine of the Church,[25] it is not permitted to receive a remuneration by reason of a contract of loan for consumption.[26] However, in the loan of an object consumable by first use, it is not in itself illicit to agree to a legal interest, unless it is certainly exaggerated. To demand a higher than legal rate of interest is permissible, provided there is a just and proportionate reason for so doing.[27]

The loan for use or *commodation* is an essentially gratuitous contract whereby one of the parties cedes the use of a thing to another, the latter taking upon himself the obligation of returning it after use. The lender remains owner of the thing loaned, whence this contract is not one of alienation proper. Canon 1537 of the Code legislates that sacred objects shall not be loaned for uses which are repugnant to their nature.

[25] See proposition 42 condemned by Pope Aleander VII, 18 Mar., 1666—Denzinger, *Enchiridion,* n. 1142; propositions 41 and 42 condemned by Pope Innocent XI, 2 Mar., 1679—Denzinger, *op. cit.,* nn. 1191, 1192; the Constitution *Vix pervenit* of Benedict XIV, 1 Nov., 1745—Denzinger, *op. cit.,* n. 1475.

[26] Canon 1543.

[27] Canon 1543; *cf.* Vromant, *De Bonis Ecclesiae Temp.,* n. 344, ubi citat Moralistas, Génicot-Salsmans (*Institutiones Theologiae Moralis,* I, 614, sqq.), et Msgr. Waffelaert (*De Justitia,* I, n. 745, sqq.).

CHAPTER VI

CONTRACTS RESEMBLING ALIENATION

In the strict sense of the word, "alienation" designates any act by which one transfers to another the ownership—*dominium directum*—of a thing which he possesses in his own patrimony: gift, legacy, exchange, loan for consumption, and sale.[1]

However, the Code understands alienation in a much wider sense. In the notion of alienation is included not only all forms of alienation in the strict sense, but also any act by which one transmits to another a real right over property which remains in the ownership of the one who cedes the right, as easement and license; any act whose purpose is to give to another as a guarantee a thing over which, however, one retains ownership, as mortgaging or giving in security; any act whereby one abandons to another the prolonged enjoyment of a thing with or without certain particular conditions, the ownership of which is retained, and which will be recovered in full at a certain fixed date, such as long-term leases, loan for use, or simple loan; and in general, all acts or contracts capable of rendering more unfavorable the condition of a church corporation, not taking into account the onerous or gratuitous nature of the contract.[2] Consequently there is no alienation in a purchase made with revenues or money not yet forming a part of the stabilized capital of a church corportaion, nor in payment made in the same fashion, lending at interest, or borrowing made without conditions or obligations which aggravate or endanger the situation of the ecclesiastical moral person.[3]

[1] Wernz, *Jus Decretalium,* III, p. 177.

[2] A. Couly, *Dictionnaire de Droit Canonique,* art. "Aliénation"; Canon 1533: "Solemnitates ad normam, can. 1530-1532, requiruntur non solum in alienatione proprie dicta, sed etiam in quolibet contractu quo conditio Ecclesiae peior fieri possit."

[3] See above, Chapter I, art. 1.

Contract of Lease

The leasing or letting out of things envisioned by the Code, is that contract by which one of the parties obligates himself to grant to the other party the enjoyment of a thing during a certain definite time for an agreed price which the latter in turn obligates himself to pay.[4]

A special permission from the bishop is necessary in order to rent immovable property belonging to an ecclesiastical moral person to the administrators of these goods or to their family and relatives within and including the second degree of consanguinity or affinity.[5]

Leasing of church property should be made in conformity with the rules laid down in Canon 1531, § 2, that is by auction or public offer when possible. In drawing up the lease, care shall be taken to insert clauses by which the lessee shall obligate himself to preserve the boundaries of the property, cultivate the land with care when such is the case, pay rental, and give all the guarantees proper to assure the fullfillment of these conditions agreed to.[6] In the matter of the leasing of a benefice, payments may not be anticipated beyond six months in advance without express permission of the bishop.[7]

The authorization of the Holy See is necessary when the lease exceeds thirty thousand lire, or about six thousand dollars, and is made for a duration of more than nine years. The authorization of the bishop, however, is necessary and sufficient in the following cases: when the lease does not exceed a duration of nine years in time, no matter what the value of the lease may be; when the lease does not exceed a price of six thousand dollars and not less than two hundred dollars; when the duration of the lease is for a longer period than nine years, but the value of the lease does not go above two hundred dollars. In order to give his authorization, the consent needed by the bishop varies according to the cases. First, he

[4] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 335.

[5] Canon 1540.

[6] Canon 1541, § 1; Vermeersch-Creusen, *Epitome,* II, n. 862.

[7] Canon 1479.

must obtain the consent of the board of consultors, the diocesan council of administration and the interested parties for a lease not more than nine years in duration but exceeding six thousand dollars in rental, and also for a lease of more than nine years in duration, when the rental is somewhere between two hundred and six thousand dollars. Secondly, he must seek the advice of the council of administration and obtain the consent of the parties interested when the lease does not exceed six thousand dollars in rental and nine years in duration, and likewise when a lease of less than two hundred dollars in rental exceeds nine years in duration. Administrators of church property may without authorization consent to a lease which does not exceed nine years in duration or two hundred dollars in rental.[8]

The lease of *emphyteusis*[9] described in Canon 1542, is a contract by which one of the parties, an owner of immovable property, grants to the other a real immobiliary right, called *emphyteusis,* which confers to the lessee, called the *emphyteuta,* a use and enjoyment more complete than the ordinary lease, for a consideration of the payment at certain fixed periods, for example each year, of a prestation or rent called the *canon.*[10] This contract is of much longer duration than the ordinary lease, and does not necessarily expire with the death of the lessee. It is unknown in English or American law, but may be likened to a ninety-nine-year lease.[11]

In the lease of *emphyteusis* on church property, the Code requires that the *emphyteuta* give all the necessary guarantees for the payment of the rent and the satisfaction of the conditions inserted in the lease. The stipulation shall be made that in the case of conflict, the parties shall settle their differences before a church

[8] Canon 1541, § 2; see above, ch. IV, art. 3. Formerly, three years instead of nine was considered long duration for a lease. Schmalzgrueber, lib. III, tit. 13, nn. 7, 8.

[9] From the Greek: εν— "in," and φυτεύω— "I plant."

[10] *Cf.* Reiffenstuel, lib. III, tit. 18, nn. 118, 119; Schmalzgrueber, lib. III, tit. 18, n. 85.

[11] See above, ch. II (Roman Law). The lessee is conferred a real right over the property, susceptible to mortgage; *cf.* League, *Roman Private Law,* p. 189.

court. It shall also be expressly declared that all improvements accrue to the land and not to the lessee, or *emphyteuta*.[12] The lessee cannot be freed from the agreed rental without the permission of the competent superior in matters of alienation. If this permission is obtained, then it becomes a true alienation, regarded as such by the Code, since according to the peculiar character of the contract of *emphyteusis* release from rental transfers the title to the *emphyteuta*.[13] He in turn, in compensation for the release, must make a cash settlement bearing interest to an amount at least equal to the rental.[14]

In American civil law, estates less than freehold are mainly of three sorts, tenancy for years, tenancy at will, and tenancy at sufferance.

Tenancy of an estate for years is a contract for the possession of lands and tenements for some determined period.

A tenancy at will is when lands or tenements are let by one party to another to have and to hold to him at the will of the lessor, by force of which lease, the lessee is in possession. The landlord can put the tenant out at will, but if he planted the land and was put out before the harvest he must be permitted to return and harvest his crop.

A tenancy at sufferance is when one comes into possession of land by lawful title, but afterwards keeps it beyond the stipulated period. Quite frequently in modern leases there is a covenant of renewal; that is, it is stipulated by the parties that if the notice

[12] Canon 1542, § 2.

[13] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 342.

[14] Canon 1542, § 1, if the release from the rental is redeemed in securities, such as government, industrial, public utilities securities, the securities cannot be accepted at their nominal or face value, if it is higher than the real value, even though the annual revenue of the securities is equivalent to the annual return from the redeemed rentals. The word *saltem* of Canon 1542, § 1, even permits that a larger sum may be asked than that corresponding to the rental. *Cf.* S. C. Conc., *Romana et aliarum,* 23 Jan., 1923—*A. A. S.,* XV (1923), 513 ff.—This decision applies also to the executor of a pious legacy, or the debtor of a rental or other periodical prestations in favor of an ecclesiastical moral person.

is not given sixty or thirty days before the expiration of the lease, it will automatically renew itself for another year. Such leases are good for only one renewal unless specified otherwise.[15]

In the usual form of leases sold today there are a great number of independent covenants, almost all of which are favorable to the landlord. The law, however, implies certain covenants which the landlord must observe. Thus the law implies, if it is not expressed, a quiet enjoyment of the premises. Unless otherwise agreed, the law implies an obligation on the part of the lessee or tenant to use the premises in a proper manner and keep the buildings in repair. This common law duty of the tenant is greatly modified by the leases in use today. In large cities it is almost the universal practice of the owners to keep the buildings in repair and redecorate every year or every second year.[16]

The power of a church corporation to lease its property is unquestioned. Not only may it lease the pews in the church, but it may lease its buildings for general or specific purposes.[17] Where property has become unsuitable for church purposes, it may even be leased under an agreement that a business building be erected on it for which the church corporation, on the termination of the lease, agrees to pay "a just and reasonable sum." [18]

Contract of Mortgage

The contract of mortgage is a consensual contract which confers to the creditor a real right over the immovable property obligated for the acquittal of a debt. The effect of the contract is to concede to the creditor a right to follow the immovable property into the hands of third holders and assure him the preference ac-

[15] Washburn, *A Treatise on the American Law of Real Property*, I, 342, 476, 509.

[16] Robinson, *Elementary Law*, nn. 130, 156.

[17] Catholic Institute *vs.* Gibbons (1878), 7 Ohio Dec. Reprint, 516, 3 Weekly Law Bulletin, 581; Lafayette St. Church Society of Buffalo *vs.* Norton (1911), 202 N. Y., 379; 95 N. E., 819; 39 L. R. A. (N. S.), 906.

[18] Zollmann, *American Church Law*, n. 186; Hollywood v. First Parish in Brockton (1906), 192 Mass., 269; 78 N. E., 124.

corded by the mortgage over other creditors in the distribution of the price of the said immovable property.[19]

In the general legislation of the Code, the contract of giving in security, sometimes referred to as pawning, comes under the same rules as that of mortgage. The only difference between these contracts is that one is confined to movable property and the other to immovable. The contract of *pignus* or giving in security is a real contract whereby a debtor remits a movable object to a creditor in surety for a debt.[20]

To give in security or mortgage church goods, or to borrow money, there must first be a legitimate reason to justify these contracts. Secondly, the legitimate superior who gives the permission required in conformity with Canon 1532 [21] must demand as a preliminary that the parties interested in the transaction be heard. He should see to it that the sums borrowed are repaid as soon as possible, and in order to effect this should fix the annual payments destined to amortize the debt.[22]

A mortgage is understood in American civil law practice to be an estate created by conveyance absolute in its form, that is, as absolute as any other deed but with a provision that on the payment of an obligation, which the conveyance was to secure, such as the payment of a sum of money, the conveyance will become void. It is, therefore, a conveyance which is canceled by the fulfillment of the obligation which it is to secure. The possession of the property usually remains in the hands of the grantor or mortgagor, though according to the terms of the deed it may go to the grantee or mortgagee immediately.

Upon failure of the mortgagor to pay his obligation it is necessary for the mortgagee to institute a court action in order to obtain title. This is generally done by bringing a bill in equity to fore-

[19] Washburn, *A Treatise on the American Law of the Real Property,* II, 30.

[20] Vromant, *Bonis Ecclesiae Temporalibus,* n. 329.

[21] In computing the value in order to determine the competent ecclesiastical Superior, the amount of the mortgage contemplated or debt to be contracted is to be considered and not the price of the property burdened. *Cf.* Vermeersch-Creusen, *Epitome,* II, 849; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 330.

[22] Canon 1538, §§ 1, 2.

close. If the mortgagor fails to fulfill his obligations at any time, as by non-payment of interest, failure to keep the taxes paid up, or wasting the property so that the security loses value, the mortgagee can present the matter to a court of equity, which in a proper case will order the property sold and payment made to the various court officers and the mortgagee. In the event there is not sufficient money to discharge the obligation, the court will enter a deficiency decree for the amount still due and owing the mortgagee. This can be collected out of any other property owned by the mortgagor.

The foreclosure of a mortgage in a court of equity will follow the usual provisions of a court of equity, and in order to secure a sale of the property the mortgagee must show that fair dealings have been done on his part. The right to redeem the property after forfeiture has always been recognized in equity and has been known as the Equity of Redemption. For a variable period in the various States, running in some States to two years and in some only to six months, the mortgagor has the right to redeem.[23]

However, in spite of the apparent repugnance of mortgage, its practical advantages are sometimes very great. It cannot be denied that church property would lie fallow, or at least would be prevented from reaching further usefulness if the power of mortgage were not used occasionally and judiciously, in order to enable a church corporation to finance itself.

The power of mortgage has been affirmed by the courts to be essential to the existence of a church corporation and express legislation is necessary in order to take away this power.[24] Except where mortgages have been contracted without the proper permission [25] courts will uphold them [26] even in Virginia where the local law will not allow the legal incorporation of church societies.[27] Except in New York State where a mortgage must be approved by

[23] Robinson, *Elementary Law*, nn. 92, 358.

[24] Walrath v. Campbell (1873), 28 Mich., 111.

[25] Levasseur v. Martin (1856), 11 La. Ann., 684.

[26] See Illinois, Indiana, Iowa, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsylvania, cases cited in Zollmann, *American Church Law*, n. 185.

[27] Linn v. Carson (1879), 73 Va. (32 Grat.), 170.

the court before it becomes binding, express legislation will be necessary to prevent a church corporation from exercising the right since it is implied in the general power to sell.[28]

On the other hand, a church corporation will not be allowed, "by a trust of its own creation, to protect the property it has mortgaged from its creditors and shield it from appropriation for the payment of its just debts. It follows that such a mortgage, after breach of condition, may be foreclosed like any other mortgage, and the purchaser on foreclosure will acquire full title after the redemption period has elapsed." [29]

[28] See below, ch. VIII, concerning the New York doctrine; Walrath v. Campbell (1873), 28 Mich., 111.

[29] See Zollmann, *op. cit.*, n. 185, and New York, New Jersey and Ohio cases cited.

CHAPTER VII

IRREGULAR ALIENATIONS

The alienation of church property legitimately performed effects a valid transfer of ownership or of a specified *jus in re* according to the terms of the contract of alienation.[1] However, if the alienation is transacted without the essential element required by Canon Law, that is, the permission of the competent ecclesiastical superior, it is null and void in the external forum from the letter and the object of the law.[2] A distinction is made between the external and the internal forum because if the alienation took place with a just cause and sufficient reasons, though without the necessary authorization, it is probably valid in the internal forum, at least until the nullity is decreed in the external forum by a competent judge.[3] Since the only element required by the law for validity is the permission of the legitimate superior, church property alienated without the other solemnities required in Canons 1530-1532 is valid, though illicit. The contract is not null but rescindible.

The meaning of "alienation" according to Canon 1534 is to be understood not only in the strict sense of the transfer of ownership, but also in the wider sense which would include a lease of longer duration than nine years, and special mortgage. Therefore, all illegal contracts which place a specific piece of church property in

[1] Wernz, *Jus Decretalium,* III, n. 167.

[2] Canon 1530, § 1, n. 3; S. C. Conc., *Albinganen. et Aliarum,* 17 Maii, 1919—*A. A. S.,* XI (1919), 383.

[3] Abbas Panormitanus, *Commentaria in quinque libros Decretalium,* cap. I, n. 9; Reiffenstuel, lib. III, tit. 13, n. 53; Zoesius, *Commentarius in Jus Canonicum Universum,* I, tract. 4, c. 16, n. 9; Schmalzgrueber, lib. III, tit. 13, nn. 129, 132; Pennacchi, *Commentaria in Constitutione "Apostolicae Sedis,"* II, p. 128, sq.; econtra: Wernz, *Jus Decretalium,* III, n. 167; D'Annibale, *Summula,* III, n. 176. *Cf.* Pichler, *Candidatus Jurisprudentiae Sacrae,* lib. III, tit. 13, n. 26; Hollweck, *Die kirchlichen Strafgesetze,* p. 245, n. 18.

a worse condition are also objects of an action of law according to the canon.[4]

Remedy in Action at Law

Canon 1534, in spite of its extreme brevity, contains a very complete answer to the question of the effects of irregular alienations.

> **Canon 1534, § 1. "Ecclesiae competit actio personalis contra eum qui sine debitis solemnitatibus bona ecclesiastica alienaverit et contra eius heredes; realis vero, si alienatio nulla fuerit, contra quemlibet possessorem, salvo jure emptoris contra male alienantem."**

First, it must be said that alienations made contrary to the provisions of Canons 1530-1532 will not always and necessarily be null, at least not in the same way and with the same force. It is useful to apply here the distinctions which come with a study of the civil law of contracts.[5] The act of alienation will sometimes be absolutely void, which is equivalent to juridical non-existence, and sometimes only voidable. Lastly, in certain cases, it will simply give rise to reparations on the part of those who by infringing on canonical rules have knowingly brought about a disadvantage to the alienating corporation.[6]

The act of alienation is absolutely void every time it lacks one of the elements which the law requires under pain of nullity.[7] This

[4] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 297: "Si Praelatus . . . absque consensu Capituli vel Consilii sui, et contra canon. 1538, § 1, . . . debita illegitime contraxerit, cum in hoc casu Praelatus, . . . inaudito vel, pro casu, dissentiente Capitulo vel Consilio, personam moralem . . . non legitime repraesentet, de his debitis ipse privatim respondere debet."

[5] See above, ch. I, art. 3.

[6] Wernz, *Jus Decretalium,* III, p. 185, sq.; *cf.* Besson, "Des aliénations nulles et des revendications par l'Ordinaire"—*NRT,* XLVII (1920), 69; Schmalzgrueber, lib. III, tit. 13, n. 151, sq.; S. C. Conc., *Albinganen. et aliarum,* 17 Maii, 1919—*A. A. S.,* XI (1919), 383.

[7] Canon 1680, § 1: "Nullitas actus tunc tantum habetur, cum in eo deficiunt qaue actus ipsum essentialiter constituunt, aut sollemnia seu conditiones desiderantur a sacris canonibus requisitae sub poena nullitatis."

is the case when the alienation is made without the necessary permission or with an authorization manifestly lacking in form. In summary, therefore, the alienation of precious objects, by their nature, and of other property worth more than six thousand dollars (or rather, more than ten thousand dollars since American bishops have obtained indults up to that amount) is null *de jure pleno* if the alienators have not beforehand the permission of the Sovereign Pontiff.[8] The alienation of property whose value varies between one thousand and thirty thousand lire or francs or between about two hundred dollars and six thousand dollars, is null if made without the authorization of the bishop given with the consent of the diocesan consultors, the council of administration and the parties concerned.[9] Property inferior to two hundred dollars in value is also invalidly alienated if made without the authorization of the bishop, the consent of the parties concerned, and a consultation with the council of administration.[10]

All irregular alienations are suspectible to attack, and those made without permission are null and should be declared so. In cases of alienation which of themselves are not void, it is the office of the judge, in taking cognizance of the circumstances, to discern whether or not they should be voided, and once declared so, they are to be considered as null *a primo instanti.* The process is not an administrative one. Unless a *compositio* shall take place outside of court, a formal *actio* is the means for redress provided in the law.[11]

The above is the doctrine found condensed in Canon 1534, § 1. It grants the church body which has suffered the damage a real action (*actio realis*) against any holder of property irregularly alienated when the alienation is null. The meaning is that in the case

[8] Canon 1532, § 1.

[9] Canon 1532, § 3.

[10] Canon 1532, § 2.

[11] Santi, *Praelectiones Juris Canonici,* lib. III, tit. 13, n. 14, 15; De Brabandere, *Compendium,* p. 214; cc. 32, 35, C. XII, 9, 2; c. 6, X, *de rebus Ecclesiae alien. vel non,* III, 13; c. 3, X, *de pignor.,* III, 21; Cance, *Le Code de Droit Canonique,* III, n. 166; A. Couly, *Dictionnaire de Droit Canonique,* v. "Aliénation."

where the judge has recognized and pronounced the nullity of the act, the corporation can claim its property from the one who holds it unjustly.[12]

The same church body has a personal action (*actio personalis*) against the administrators and their heirs to oblige them to repair the wrong done.[13] It must be noted that a real action against an illegal holder of church property does not exclude a personal action against the administrator who alienated. The latter always remains obliged to repair the damage caused to the establishment he represents. These actions at law are not penal but are intended for the preservation of the patrimony of the Church[14]

In all cases where the irregularity of the alienation has been decided, the ecclesiastical moral person that has received the price of the alienation and has kept it, must remit the sum to the one who restores to it the alienated property. A suit against a cleric, by reason of the privilege of the forum, must be brought in an ecclesiastical court and not in a civil court unless custom or a concordat shall dictate otherwise.[15] A suit against the bishop must always be brought in a church court; the plaintiff needs a special permission of the Holy See to introduce a civil suit against him. The bishop, however, may permit a cleric to appear before a civil court when there are good reasons.[16] In determining the proper diocesan court before whom the accusation of irregular alienation may be

[12] Paulus IV, const. *Iniunctum nobis,* 14 Jul., 1555, § 5—*Fontes,* n. 88; c. un., *de rebus eccles. non alien.,* III, 4, in *Extravag. Com. (Ambitiosae); cf.* Vermeersch-Creusen, *Epitome,* II, 856: "*Personalis* seu *condictio* dicitur actio judicialis quae, ob facta propriae personae, huic tantum et heredibus intentari potest; dum *realis* est qua quis jus in re contra quemlibet detentorem persequitur."

[13] Wernz, *Jus Decretalium,* III, p. 186; Zallinger, *Institutiones Juris Ecclesiastici,* III, tit. 13, n. 160; Santi, *Praelectiones Juris Canonici,* lib. III, tit. 13, n. 18; Grandclaude, *Jus Canonicum,* II, p. 271; De Meester, *Compendium,* III, n. 1488: "Nomine Ecclesiae stat in judicio rector vel administrator ad normam c. 1649"; *cf.* cc. 1526, 1653, § 2.

[14] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 299; Wernz, *Jus Decretalium,* III, p. 186.

[15] Canon 120; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 299.

[16] Canon 120, § 2; Wernz-Vidal, *Jus Canonicum,* VI, n. 38.

tried, the object of the suit will decide. If it concerns a contract of alienation, the competent forum is the diocesan court of the locality where the contract was either entered into or is to be fulfilled. Whenever the suit is directed against a certain definite piece of property the forum follows the locality of that property.[17] Prescription operates in all irregular alienations from the moment when the suit could be brought. It cannot exist unless there is good faith not only at the beginning of the period, but throughout its whole duration. The duration is thirty years for all immovable and precious movable property, all real and personal rights and actions, of any ecclesiastical moral person and one hundred years when these rights, actions and property belong to the moral person of the Holy See.[18] Once this period is passed the clouded title becomes clear.

As has been said above, contracts of alienation that labor under the vice of nullity due to lack of proper permission, give rise to an action for declaration of nullity.[19] Contracts which have the required authorization for validity, but which are illicitly granted or obtained through lack of conformity with the other solemnities required by the canons, may be rescinded to open the way for a *restitutio in integrum.* The principle is that such contracts are valid, but due to the grave wrong which they cause are declared by a judge to be of no effect and not binding by reason of natural equity. The extraordinary remedy of the law called *restitutio in integrum* returns things to the state in which they existed before the damage was caused.[20]

[17] Canons 1564, 1565; see Canon 1560, n. 3; *cf.* Burke, *Competence in Ecclesiastical Tribunals,* pp. 42 ff.; Noval, *De Processibus,* I, 26; Roberti, *De Processibus,* I, 127; Wernz-Vidal, *op. cit.,* VI, nn. 58, 59.

[18] Canons 1511, 1512, 1701, 1705, § 1; Wernz-Vidal, *op. cit.,* VI, nn. 362, 363.

[19] Canons 1679-1683; *cf.* S. R. Rota, 30 Jan., 1923, ad 4 um—*A. A. S.,* XV (1923), 124, n. 4.

[20] Reiffenstuel, lib. I, tit. 41, n. 3: "Extraordinarium juris remedium, quo graviter laesus, ex naturali aequitate, ex officio judicis reducitur in eum statum, sive jus, in quo erat ante laesionem." *Cf.* S. R. Rota, 7 Feb., 1916—*A. A. S.,* VIII (1916), 277: "Ut autem hoc remedium concedatur tria requiruntur: (1)

The succeeding paragraph of Canon 1534 enumerates the persons who may attack alienations which are void, voidable or simply irregular and who may bring up the various suits mentioned above.

Canon 1534, § 2. "Contra invalidam rerum ecclesiasticarum alienationem agere possunt qui rem alienavit, eius Superior, utriusque successor in officio, tandem quilibet clericus illi ecclesiae adscriptus quae damnum passa sit."

The one who performed the alienation, supposing him to be the administrator of the church corporation, and all those who succeed him in office, are first among those who may attack irregular alien-

ut adsit laesio gravis ac notabilis juxta arbitrium boni viri, seu discreti judicis: proinde non attenduntur laesiones leves." (See S. R. Rota, *Novarien.*, 7 Aug., 1917—*A. A. S.*, X (1918), 337; S. R. Rota, *De Manila*, 18 Feb., 1919—*A. A. S.*, XII (1920), 185; S. R. Rota, *Dioecesis Z.*, 19 Maii, 1921—*A. A. S.*, XIII (1921), 547.) "(2) ut laesio illa gravis acciderit dolo adversarii, vel inconsulta facilitate laesi, aut negligentia sui procuratoris . . . idque vel manifeste constet, vel saltem in judicio per laesum rite probetur." (See S. R. Rota, *De Manila*, 18 Feb., 1919—*A. A. S.*, XII (1920), 185; S. R. Rota, *Novarien.*, 7 Aug., 1917—*A. A. S.*, X (1918), 338: "Restitutio in integrum adversus rem judicatam non conceditur nisi clare et concludenter appareat de injustitia, unde deducitur laesio . . . Haec fuit constans S. R. Rotae jurisprudentia"). "(3) ut adsit justa causa, circa quod ultimum requisitum distinguendum est inter majores aut minores, aut ecclesias, quae jure minorum hac in re frui censentur." (See S. R. Rota, *De Manila*, 18 Feb., 1919—*A. A. S.*, XII (1920), 185: "Omnia corpora ecclesiastica . . . Episcopi auctoritate erecta, comprehenduntur; et non solum hoc beneficio utitur ecclesiae contra laicum, sed etiam contra aliam ecclesiam sicut minor contra minorem etiam restituitur, sed tunc tantum cum pars non sit utriusque causa: *e. g.*, si una pars restitutionem petat ob veram laesionem, alteri vero contigerit lucrum." *Cf.* Canons 1687-1689; Aichner, *Compendium*, p. 827; De Meester, *Compendium*, III, 1488; Wernz, *Jus Decretalium*, III, n. 169; V, n. 736; De Angelis, *Praelectiones J. C.*, lib. I, tit. 41, n. 3; cc. 1, 2, *de in integr. restit.*, I, 46, in VI°; c. un., *de in integr. restit.*, I, 46, in Clem.; Reiffenstuel, lib. I, tit. 46, nn. 10, 11, 131, 134; Munerati, *Elementa*, n. 335, nota 5; Noval, *De Processibus*, I, 343-346; Wernz-Vidal, *Jus Canonicum*, VI, 315-321; Vermeersch-Creusen, *Epitome*, III, 116-121; Roberti, *De Processibus*, I, 249-252. See *A. A. S.*, IV (1912), 188-190: Signatura: highest tribunal of appeal.

ations.[21] The alienator, however, can sue only the purchaser or detainer of the property and then only to have the nullity of the alienation declared or pronounced. His successors in office can bring both an *actio realis* against the holders of the property and an *actio personalis* against the unlawful alienator or his heirs. The alienation may also be attacked by the hierarchical superior whose office is to grant the authorization necessary for the alienation, and his successors.[22] Lastly, any cleric, whether a priest or not, who is attached to the work or to the church which formerly held the property, may bring suit to recover.[23] The expression of the canon, *quilibet clericus illi ecclesiae adscriptus, quae damnum passa sit,* seems restrictive and would not extend so far as to grant any priest of a diocese, for example, the right to bring suit against any irregular alienation of diocesan property that has come to his notice. Any ecclesiastical person may voice disapproval,[24] but the right to bring action belongs only to the cleric lawfully attached to the church corporation which has suffered from the alienation illegally performed, and not any priest who happens to be residing in that parish. Such has been the traditional meaning of this canon, and the Code does not seem to have changed the legislation in this respect.[25]

Although this enumeration is restricted, one may ask whether in certain cases the purchaser who seems excluded by the text of the canon has not also the right to attack the act in order to obtain a sentence of nullity.[26] It seems that this faculty should be refused him whenever, acting with knowledge aforethought, he has been the

[21] Cc. 6, 9, X, *de rebus eccles. alien vel non,* III, 13; c. 2, X, *de donat.,* III, 24; Schmalzgrueber, lib. III, tit. 13, n. 151, sq.; Wernz, *Jus Decratalium,* III, n. 168; cc. 41, 42, C. XII, q. 2; c. 2, X, *de precariis,* III, 14.

[22] Wernz, *Jus Decretalium,* III, n. 168.

[23] C. 6, X, *de rebus ecclesiae alienandis vel non,* III, 13; Vermeersch-Creusen, *Epitome,* II, 856.

[24] C. 6, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[25] Wernz, *op. cit.,* III, n. 168; see however, Vromant, *De Bonis Ecclesiae Temporalibus,* n. 298 (4).

[26] *Cf.* Roberti, *De Processibus,* I, 321, where he admits an *actio popularis.*

accomplice of the guilty alienators. Civil law contains a rule of this kind against all those who have contracted with minors and it seems that the same rule holds and applies in Canon Law as concerns alienation of church property made at variance with the lawful prescriptions. These prescriptions have for their object the protection of church corporations and the safeguarding of their patrimony. In no way do they intend to come to the aid of purchasers or detainers of property who knowingly seek to enrich themselves at the expense of the Church. However, when the purchase has been made in good faith, and when all the moral responsibility for the act falls on other shoulders than his, the buyer finds himself the victim of error or fraud which has placed him, with regard to the Church, in an unpleasant situation, and there seems no good reason why he should be denied an *actio* based on error or fraud.[27]

The *actio de dolo* is, both in Canon Law and civil law, open to everyone.[28] Canon 1531, § 2, in directing to alienate to the highest bidder, and the same canon forbidding to alienate for a price inferior to the estimate, appears to open the way for an action of fraud when the best interests of the church corporation have been sacrificed through alienation by the administrator. It would follow that the judge sitting upon such a case has the faculty of voiding an alienation where one or the other of these prescriptions have been violated. Error is also admitted as cause for nullity of contracts when it concerns an essential quality of the object of the agree-

[27] Besson, "Des aliénations nulles et des revendications par l'Ordinaire"—*NRT.*, XLVII (1920), 69; Couly, *Dictionnaire de Droit Canonique,* art. "Aliénation."

[28] Canon 1684, § 1; Wernz-Vidal, *Jus Canonicum,* VI, 302-304; *cf.* Noval, *De Processibus,* I, 340; Roberti, *De Processibus,* I, 246. In civil law, to constitute fraudulent representation, the following elements must concur: (1) the defendant must make a representation as to a material fact; (2) the representation must be false and known to be false by the defendant at the time he made it, or made as a positive assertion recklessly without knowledge of its truth, and made with intention that it be acted upon by the defendant; (3) the plaintiff must believe in the truth of the representation; (4) the plaintiff must act upon the representation, and (5) the plaintiff must sustain a loss. Robinson, *Elementary Law,* n. 353. See above, chap. I, art. 3: Statute of Frauds.

ment.[29] It is evident that a good Catholic would not have bought church property knowing that the administrators with whom he dealt had no capacity to sell and that consequently the property was, for the moment at least, inalienable.[30]

An alienation that is null because of lack of authorization cannot be healed by the bishop even though he was the competent superior to grant permission for the particular alienation. The Congregation of the Council was asked the question [31] and replied that only the supreme legislator, the Roman Pontiff, could heal a contract that was null and never existed. By this is meant that the Holy See can heal a contract null because of the absence of external formalities, but, of course, cannot heal a contract which is void because of the lack of internal consent by the parties. Therefore, without a *sanatio* by the Holy See, the formalities of the alienation must be repeated in order to make the contract valid.[32] Only the supreme legislator has the power to dispense from these external formalities. The dispensation, or *sanatio,* makes the act good *ex nunc* not *ex tunc,* except by fiction of law which is operative only between the parties themselves whose consent was originally given.[33]

Penal Sanctions

All the penalties incurred by irregular alienation are now contained in Canon 2347.

[29] Canons 103, § 2; 104, 1686 sqq.; ex errore: Canons 1684, § 2; 1686; Roberti, *De Processibus,* I, 383.

[30] *Cf.* De Meester, *Compendium,* III, n. 1488: "In cit. Canon (1534, § 2), etsi dicatur quod praefati agere possunt, tamen primi tres *ex justitia* agere debent, clerici quilibet ecclesiae damnum passae adscripti, *ex caritate,* cum ad ipsos spectat tueri bona et jura Ecclesiae cui serviunt."

[31] S. C. Conc., *Albinganen. et aliarum,* 17 Maii, 1919: "Dubium: An loci Ordinarius vi canonis 1532 sanare valeat peractas sine debita licentia alienationes bonorum ecclesiasticorum, quorum valor non excedat triginta millium libellarum. Responsum: Negative"—*A. A. S.,* XI (1919), 387.

[32] Vromant, *De Bonis Ecclesiae Temporalibus,* n. 295.

[33] S. C. Conc., votum consultoris, *Albinganen. et aliarum,* 17 Maii, 1919—*A. A. S.,* XI (1919), 386, 387; c. 3, X, *de his qui fiunt a praelato sine consensu capituli,* III, 10; S. C. Conc., *Camerinen.,* 17 Dec., 1814, ad I—*Fontes,* n. 3944; S. C. Conc., *Fanen.,* 22 Mart., 1823, ad I—*Fontes,* n. 3979; De Meester, *Compendium,* III, 1488; Vermeersch-Creusen, *Epitome,* II, 856.

Canon 2347. "Firma nullitate actus et obligatione, etiam per censura urgenda, restituendi bona illegitime acquisita ac reparandi damna forte illata, qui bona ecclesiastica alienare praesumpserit aut in iis alienandis consensum praebere contra praescripta can. 534, § 1, et can. 1532:

1°. "Si agatur de re cuius pretium non excedit mille libellas, congruis poenis a legitimo Superiore ecclesiastico puniatur;

2° "Si agatur de re cuius pretium sit supra mille, sed infra triginta millia libellarum, privetur patronus iure patronatus; administrator munere administratoris; Superior vel oeconomus religiosus proprio officio et habilitate ad cetera officia, praeter alias congruas poenas a Superioribus infligendas; Ordinarius vero aliique clerici, officium beneficium, dignitatem, munus in Ecclesia obtinentes, solvant duplum favore ecclesiae vel piae causae laesae; ceteri clerici suspendantur ad tempus ab Ordinario definiendum;

3°. "Quod si beneplacitum apostolicum, in memoratis canonibus praescriptum, fuerit scienter praetermissum, omnes quovis modo reos, sive dando sive recipiendo sive consensum praebendo, manet praeterea excommunicatio latae sententiae nemini reservata."

This canon is aimed exclusively at ecclesiastical administrators of church property, those who deal with them, those whose authorzation or consent is necessary to render an alienation legitimate, and excludes all others, as usurpers for example. These latter are treated in the preceding canon.[34] The object of the canon is to clarify and fix the penalties carried by the Constitutions, *Ambitiosae* of Pope Paul II, and *Apostolicae Sedis* of Pope Pius IX. In like manner, it does not reach all the irregularities that may affect an alienation, but only those that flow from lack of authorization

[34] Canon 2346; see also Canon 2345.

or from defective authorization, that is, the irregularities resulting from violation of Canon 1532.[35]

Like Canon 1532, of which it is the penal sanction, Canon 2347 distinguishes between authorizations to alienate that should emanate from the Holy See, and those proper to the bishop. In the latter case, further distinction is made according to the value of the property alienated. In the first instance, that is, the alienation of precious objects or property worth in excess of thirty thousand francs or lire,[36] that is, objects incapable of alienation without the *beneplacitum apostolicum,* the alienators, purchasers, and all those who in any manner gave their consent to the alienation, consequently the bishop, the members of the council of administration, members of the diocesan board of consultors, and the parties concerned, incur *ipso facto* and excommunication *nemini reservata* if they have acted without obtaining the *beneplacitum.*[37] The terms used by the legislator are the most general possible and apply to all who have cooperated in any way in the alienation: *omnes quovis modo reos sive dando, sive recipendo, sive consensum praebendo.*[38]

The alienation must be a complete and perfect alienation,[39] and since it is a matter of penal sanctions, it should be restricted to the

[35] *Cf.* c. un., *de rebus ecclesiae non alienandis,* III, 4, in Extravag. com.; Pius IX, const., *Apostolicae Sedis,* 12 Oct., 1869, § IV, n. 3—*Fontes,* n. 552; S. C. Conc., *Clodien.,* 19 Jan., 1606—*Fontes,* n. 2361; S. C. Conc., *Romana,* 16 Aug., 1806, ad VI—*Fontes,* n. 3923; Cappello, *De Censuris,* n. 413; Teodori, "Alienantes Bona Ecclesiastica sine Beneplacito Apostolico," ad II, *Consultationes Juris Canonici,* I, 320.

[36] See chap. IV, art. 3, above: Quinquennial faculties of the bishops of the United States.

[37] *Cf.* Constt. *Ambitiosae* et *Apostolicae Sedis,* cit. supra; Hollweck, *Die kirchlichen Strafgesetze,* n. 158; Wernz, *Jus Decretalium,* III, 186; c. 2, X, *de solutionibus,* III, 23; c. 2, *de rebus ecclesiae non alien.,* III, 9, in VI°; c. un., *de rebus ecclesiae non alien.,* III, 4, in Clem.; S. C. S. Off., *Ratisbonen.,* 22 Dec., 1880, ad II—*Fontes,* n. 1068; Cappello, *De Censuris,* n. 414, etc.

[38] Teodori, "Alienantes Bona Ecclesiastica," ad II, *Consultationes Juris Canonici,* I, 321; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 305; only Cardinals are excepted in virtue of Canon 2227, § 2.

[39] Vermeersch-Creusen, *Epitome,* III, 547; Teodori, art. cit., *Consultationes,* I, p. 321; Vromant, *op. cit.,* n. 305.

actual transfer of ownership, or at least the granting of a real right of long duration. Since there is a difference of opinion among authors, the more favorable may be followed.[40] However, it must be noted again, that Canon 2347 refers only to Canon 1532 and therefore alienations that are irregular but not null through lack of proper consent, do not incur for the alienator the penalties enumerated.[41]

Since the canon reads: *qui bona ecclesiastica praesumpserit,* and *si beneplacitum apostolicum fuerit scienter praetermissum,* there is the occasion to apply the rule of Canon 2229, § 2, which admits of any excuse arising from defect of knowledge or will, except *ignorantia affecta* which never excuses.[42] The censure is reserved to no one, but a confessor may not give absolution unless the penitent has true contrition, and seriously promises to faithfully fulfill the pro-

[40] De Meester, *Compendium,* III, 1489, nota 2: "Agitur probabilius de alienatione stricte dicta quod est dominium transferre; proinde vendere, donare, permutare, in solutionem dare, in emphyteusim concedere; non autem commodare, locare, pecuniam mutuo dare, hypothecae subdere, oblata vel relicta Ecclesiae repudiare, in re dubia transigere."; Teodori, "Alienantes Bona Eccesiastica," ad II, *Consultationes Juris Canonici,* I, 321: "Quoad effectus poenales alienatio stricto sensu sumenda est, prout significat solam et veram dominii translationem"; *cf.* Cappello, *De Censuris,* p. 357; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 303: "Alienatio intelligitur proprie sed late dicta, *v. g.,* hypotheca specialis, immo locatio ultra novennium, non vero aes alienum quod contrahitur absque hypotheca speciali."; Vermeersch-Creusen, *Epitome,* III, 547: "Alienatio, consistit in translatione juris in re quolibet modo facta, *v. g.,* donatione, venditione, servitute, hypotheca, etc."; Hollweck, *Die kirchlichen Strafgesetze,* p. 244, nota 11.

[41] Vermeersch-Creusen, *Epitome,* III, 547; Chelodi, *Jus Poenale,* n. 79.

[42] *Cf.* Canon 16, § 2: etiam circa errorem eodem canone; Canon 2229, § 1: ignorantia affectata; Canons 2229, § 3, 2218, §§ 1, 2; *A. A. S.,* XVIII (1926), 136; Canon 2202, de ignorantia; Canon 2199, de imputabilitate; Canon 2202, § 3, de inadvertentia et de errore, etc.; Teodori, art cit., ad II, *Consultationes Juris Canonici,* I, 321: "Attentis juris dispositionibus, apparet ignorantiam, etiam crassam vel supinam, excusare (Canon 2229, § 3, n. 1), ita ut ad hanc censuram incurrendam requiratur ut quis sciat agi de bonis ecclesiasticis, requiri veniam pontificiam, et quidem sub poena censurae"; Vermeersch-Creusen, *Epitome,* III, 547: "Plenissimus enim dolus requiritur." *Cf.* Vromant, *De Bonis Ecclesiae Temporalibus,* n. 303, II; Pejska, *Jus Canonicum Religiosorum,* p. 73.

visions of the law in his case.[43] Bishops can no longer be held exempt from the censures as was contended by some authors under the old law.[44] The constitution *Ambitiosae* upon which the exemption was based, is no longer the norm of the censure. Not only are bishops not exempted, but they are implicitly included in virtue of Canon 2347, n. 2.[45]

Besides excommunication, the *male alienantes* of Canon 2347 may also incur the penalties of section two of this canon. When the value of the immovable or movable property which is the object of illegal alienation exceeds one thousand lire but not thirty thousand, the penalties vary according to the quality of the guilty party. If the alienator possesses the right of patron over a church fabric (*jus patronatus*) he shall be deprived of it. The unfaithful administrator shall be recalled. The clerics who hold an office, benefice, dignity or duty in the Church shall pay the wronged church corporation double the damage caused. Other clerics are to be suspended by the bishop, the length of the suspension to be determined by him. Since these penalties are not *latae sententiae* they can only be applied by a judiciary sentence and following a regularly conducted procedure, in the course of which the judge should take into consideration the good faith of the guilty ones, being guided by the dispositions of the common law in the matter of the infliction of penalties.[46]

In the case of an alienation of property worth less than one thousand lire, or about two hundred dollars, it is the office of the competent ecclesiastical superior, always following the rules of penal

[43] Teodori, "Alienantes Bona Ecclesiastica sine Beneplacito Apostolico," ad II, *Consultationes Juris Canonici,* I, 322; S. C. Conc., *Camerinen,* 17 Dec., 1814, ad 2—*Fontes,* n. 3944; S. C. Conc., *Fanen.,* 22 Mar., 1823—*Fontes,* n. 3779.

[44] Pennacchi, *Commentaria in Constitutione "Apostolicae Sedis,"* II, 142; Wernz, *Jus Decretalium,* III, 170.

[45] *Cf.* Canon 2227, § 2, where no mention is made of exemption from excommunication; Leech, *A Comparative Study of the Constitution "Apostolicae Sedis" and the "Codex Juris Canonici,"* p. 106.

[46] Canons 2218, sqq.; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 304; A. Couly, *Dictionnaire de Droit Canonique,* v. "Aliénation."

procedure, to inflict the culpable ones with such punishment as he shall judge opportune.[47]

The difficulties intrinsic to a law necessarily form part of the object intended by the legislator, and hence never constitute an excusing clause. Grave inconvenience does excuse from preceptive laws, the fundamental reason being that when the object of the law becomes notably more difficult, there no longer exists the obligation which the legislator intended to impose.[48] However, in order that the inconvenience form an excusing clause, it is necessary that it should be proportional to the gravity of the law. In other words, the inconveniences involved by fulfillment should outweigh those connected with non-fulfillment. There is no doubt that serious extrinsic difficulty excuses not merely from the preceptive but also from the penal effect of penal laws. Punishments in penal laws are imposed for the moral and juridical fault involved in the violation of them. Whatever excuses from the moral and juridial obligation also excuses from the punishment.[49]

[47] *Cf.* Canon 2223, § 3; Vromant, *op cit.*, 304 (I); Wernz, *Jus Decretalium,* III, 187.

[48] Bucceroni, *Theologia Moralis,* p. 180: "Si objectum legis ex circumstantiis particularibus difficile et gravis fiat, jam non est illa obligatio quam intendit legislator imponere, cum illud objectum sit notabiliter immutatum."

[49] *Cf. C*anons 2205, § 2; 20; *cf.* Cocchi, *Commentarium in Codicem Juris Canonici,* I, 80; Maroto, *Institutiones Juris Canonici,* n. 232; Wernz, *Jus Decretalium,* I, 110.

CHAPTER VIII

AMERICAN CIVIL LAW

THE Universal Church and the Holy See, as such, are not recognized as juristic personalities in the United States in the sense in which this right is vindicated in Canon Law. This statement, however, must immediately be qualified. The internal discipline of the Catholic Church over her own members in matters of faith and morals and the decisions of her tribunals are regarded as binding by the courts of the land. In certain particular instances, particularly in those territories which once belonged to Spain, namely, Cuba, Puerto Rico, and the Philippine Islands, the Universal Church is, however, recognized as a legal entity possessing the right to establish corporations.[1]

Therefore, in American civil law the Church functions as a group of individual religious corporations, each a separate corporate entity governed by its own particular laws and the powers derived from the various state laws under which each is incorporated. In general, ecclesiastically established institutions have no rights under the secular laws solely by virtue of their canonical establishment. If they wish to exercise powers of corporate rights, including the incidental right of alienation, they must seek and obtain recognition as a corporation by the state.[2]

[1] Art. 8, Treaty of Paris, Dec. 10, 1898—U. S. Stat. at Large, 1758. *Cf.* Brown, *The Canonical Juristic Personality* (Washington, 1927), p. 115; Dignan, *History of the Legal Incorporation of Catholic Church Property in the United States* (Washington, 1933), p. 237; Hannan, *The Canon Law of Wills* (Washington, 1934), n. 526; Zollman, *American Church Law* (St. Paul, 1933), nn. 10, 102; see Ponce v. Roman Catholic Apostolic Church in Puerto Rico (1908), 210 U. S. 296, 310, 28 Supr. Ct. 737, 52 L. Ed. 1068, Santos v. Holy Roman Catholic and Apostolic Church (1908), 212 U. S. 463, 29 Supr. Ct. 338, 53 L. Ed. 599; Barlin v. Ramirez (1906), 7 Philippines 41, 58.

[2] Brown, *The Canonical Juristic Personality,* pp. 133, 135; Waterman, *A Treatise on the Law of Corporations* (2 vols., New York, 1888), I, n. 19; Hannan, *The Canon Law of Wills,* nn. 525, 528, 529. In Delaware and Ver-

The outgrowth of this attitude of the American civil law toward religious societies has resulted in the existence in the United States today of three general variations of ecclesiastical corporations: the corporation sole, the corporation aggregate, and the trustee corporation.[3] While their aims are different from those of other classes

mont, no conveyance is valid unless the association is incorporated under the laws of the state, but a conveyance to a church group is valid in the District of Columbia even if it is not incorporated and has not appointed trustees. Virginia and West Virginia forbid the incorporation of religious societies but permit subordinate church corporations to incorporate. Virginia Constitution of 1902, § 59; West Virginia Constitution of 1872, art. 6, § 47. Church lyceums and dramatic societies can incorporate and transact business for the parish. Zollman, *American Church Law,* n. 51; Hannon, *The Canon Law of Wills,* n. 529; Dignan, *op. cit.,* p. 261.

[3] The dangers of the fee-simple tenure of church property by the bishop (inheritance by heirs at law) caused it to be abolished in 1911. *AER.,* XLV (1911), 585, 586; Bartlett, *The Tenure of Parochial Property* (Washington, 1926), pp. 52-66; Brown, *The Canonical Juristic Personality,* pp. 148-153; Hannan, *The Canon Law of Wills,* n. 531. But in the states of Missouri and Indiana, where the old trustee system still prevails, the bishops of St. Louis and Indianapolis continue to hold the church property in fee-simple. *Cf.* Dignan, *History of the Legal Incorporation of Catholic Church Property in the United States,* pp. 262-264. The corporation sole system lays bishops open to suspicion of arbitrary management of church funds or property. The danger of such a suspicion is absent from the type of corporation aggregate or membership corporation first created by New York in 1863. On the other hand, the hierarchical constitution of the Church is explicitly recognized by it. An aggregate corporation implies that the church members as a whole are the incorporators, as distinct from the trustees. The latter fill the rôle of business managers of the corporation. The corporation aggregate is not identical with the canonical concept of a parish—*persona moralis non collegialis*—but seems to approach it as closely as possible in American law. By the New York law, the members of the congregation cannot appoint the members of the parish corporation. The bishop, the vicar general, and the pastor are *ex officio* managers, and they appoint the additional two lay members. This type of corporation aggregate exists in several states in varied forms. New York, New Jersey, Connecticut, Massachusetts, Wisconsin, and—with a less favorable type of incorporation—Delaware and Maryland have explicit reference to the Catholic Church. Montana, Minnesota, Oregon, and Nebraska statues embody the corporation aggregate system but without any explicit reference. Bartlett, *The Tenure of Parochial Property,* pp. 82-94; Brown, *The Canonical Juristic Personality,* pp. 137-144; Dignan, *History of the Legal Incorporation of Catholic Church*

of corporations, they have no higher status before the law than that enjoyed by private corporations. They are created for the purpose of managing church property and are endowed with substantially the same rights, subject to substantially the same liabilities, and governed by substantially the same rules as are other private corporations. They are on an equality with natural persons so far as real estate and trusts are concerned.[4] Insofar as they have author-

Property in the United States, pp. 267, 268. The vesting of property in parish trustees is disapproved by the Church. One has but to recall the litigation in Pennsylvania and several other states to understand the reason. Even where the bishop acts as trustee the principle of lay control is emphasized for the bishop merely holds as trustee for the lay group. Since the trust is known as a dry trust (a mere formality) in civil law, the bishop could be compelled by a recalcitrant congregation to turn over the property to the parish. States retaining the trustee system are Arkansas, Colorado, Indiana, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, Tennessee, Texas, and also the District of Columbia. Dignan, *op. cit.,* p. 263; Hannan, *The Canon Law of Wills,* n. 537; Brown, *op cit.,* pp. 153-158; Bartlett, *op. cit.,* 67-74. Corporation sole in the bishop is confined mostly to the far West except for a few dioceses thus incorporated by special act: Baltimore, Boston, Chicago, Manchester, Providence, Charleston. Corporation sole is permitted in Alabama, Arizona, California, Idaho, Maine, Montana, Nevada, Oklahoma, Utah, Washington, Wyoming, and probably New Hampshire, where a minister and his successors are authorized to hold property. Provisions similar to those that enable a bishop to become a corporation sole are found in Michigan and South Dakota, where the bishop and his successors may take the legal title as trustees for the parishes. Dignan, *op. cit.,* pp. 259, 263; *cf.* Bartlett, *op. cit.,* pp. 75-81; Brown, *op. cit.,* pp. 144-148. In Iowa the Code is not specific, but church property is held by parish corporations (bishop, vicar general, pastor and two laymen), and fully safeguarded. Ohio seems to provide for a diocesan corporation holding all diocesan property, parochial and charitable, in permitting incorporation of "the central Catholic Church." It also allows the incorporation of any religious endowment. Hannan, *op. cit.,* n. 535. The dioceses of Burlington and Natchez are incorporated by special charter. Dignan, *op. cit.,* p. 261.

[4] Voorhees v. Presbyterian Church of Amsterdam (1853), 17 Barb. (N. Y.), 103; Klix v. Polish Roman Catholic St. Stanislaus Parish (1909), 137 Mo. App., 347, 118 S. W. 1171, 1174; O'Donaghue v. McGovern (1840), 23 Wend. (N. Y.), 26, 32; Horst v. Traudt (1908), 43 Colo. 445, 96 Pacific 259; Moore v. First Ruthven Circuit M. E. Church (1902), 117, Iowa 33, 90 N. W. 492; Norwegian Evangelical Lutheran Bethlehem Congregation v. United States Fidelity & Guaranty Co. (1900), 81 Minn. 32, 83 N. W. 487.

ity to make contracts, they are "subject to the ordinary rules of law and equity applicable to any other contracting party."[5] "Religious organizations come before the courts in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraint."[6]

The fundamental rule is that an ecclesiastical corporation must act according to its nature. It possesses only those powers which are expressly or impliedly given to it, and the statutes which confer these powers are to be interpreted so as to exclude those rights which are not therein contained.[7] A corporation and an individual do not stand upon the same footing with regard to the right of contracting. The latter may make all contracts which in the eyes of the law are not inconsistent with the interests of society, whereas the former, being created for a specific purpose, must look to its charter, which is, as it were, the law of its nature, to ascertain the extent of its capacity. Not only can it make no contract forbidden by its charter, but more specifically it can enter only into those which are required to effectuate the purposes of its creation.[8] A corporate act or contract is *ultra vires* when it is beyond the powers conferred upon the corporation under any circumstances or for any purposes. It should not, however, be confused with illegality. Purely executory contracts, if *ultra vires,* will not be enforced where no wrong will be done by leaving the parties in their previous situation. But the executed dealings of a corporation will be allowed to stand for and against both of the parties when the plainest rules of good so require. The doctrine of *ultra vires* ought not to be allowed to prevail where it would defeat the ends of justice and work a legal wrong.

[5] Bowen v. Trustees of Irish Presbyterian Congregation (1860), 19 N. Y. Super. Ct. 245.

[6] Watson v. Jones (1871), 80 U. S. (13 Wall.) 679, 714, 20 L. Ed. 666.

[7] Roman Catholic German Church v. Weighaus & Bros. (1894), 16 Ky. Law Rep. 446.

[8] Kerr v. Hicks (1910), 154 N. C. 265, 268, 70 S. E. 468, 33 L. R. A. (N. S.) 529; Zollman, *American Church Law,* nn. 175-177; Brown, *The Canonical Juristic Personality,* p. 179.

To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them is something very different and savors of an inducement to fraud. In the strict sense, a corporate act *ultra vires* has an available defense because all persons are presumed to know that the corporation has no power to act. Although the power or capacity to alienate property, real and personal, and to contract obligations is incident to a corporation at common law without any special mention of such a power in the charter, yet an act of alienation is *ultra vires* when performed without reference to the rights of certain parties without whose consent the corporation is not authorized to contract. The defense may or may not be available here, depending sometimes upon the question whether the party dealing with the corporation performed the act for an unauthorized purpose or under circumstances not justifying its performance. A person who has obtained corporation property or funds in an *ultra vires* transaction has obtained what the parties dealing with him had no power, no authority to alienate. It belongs to the corporaton, not to him. Therefore, it seems necessarily to follow that restoration must similarly be made, in specie or in value, when the alienation was *ultra vires*.[9]

In the absence of contract, a corporation, unless specially restrained by its charter, has the inherent right, without any express authority of the civil courts, to dispose of its property, and such dispositions will be approved by the courts.[10] It may determine when its real estate shall be sold and has the exclusive power to enter into contracts for that purpose.[11] However, a religious corporation which holds property charged with a trust for certain pur-

[9] Waterman, *A Treatise on the Law of Corporations* (2 vols., New York, 1888), I, nn. 157, 160, 161, 164.

[10] Langolf v. Seiberlitch (1851), 2 Pars. Eq. Cas. (Pa.), 64; Trustees of the Catholic Cathedral Church of Baltimore v. Manning (1890) 72 Md., 116, 19 Atlan. 599.

[11] Waterman, *A Treatise on the Law of Corporations,* I, n. 171.

poses cannot divert it to other inconsistent uses either by corporate action or by the trustees individually. One of the situations giving rise to most litigation and doubt in the minds of trustees for charity is whether they are empowered to sell realty given to them by the settlor. Frequently, a change of circumstances has made such a transaction advantageous, but the instrument contains no express power to alienate. Where the power of sale is not included in the terms of the trust, and there is no statutory authority for it, application must be made to a court for permission to make such proposed alienation.[12]

The right of a corporation to buy or sell real estate or to borrow money implies the power to mortgage the corporate property to secure debts. Likewise, the statute of uses, even strictly construed, will not prevent its giving security by a pledge. A corporation may take a mortgage on real estate to secure loans or debts made or created in the regular course of its business. Unless restrained by charter, it may take a mortgage or deed of trust on real estate to secure anticipated advances or liabilities.[13] The power of an ecclesiastical corporation to mortgage or lease its property if not expressly given will be implied.[14] The courts will not be exacting in reference to the procedure which the corporation may choose to adopt.[15] It has been held that ecclesiastical corporation may assign

[12] Bogert, *The Law of Trusts and Trustees* (7 vols., St. Paul, 1935), II, n. 392. If an unincorporated society becomes corporated, property owned by it passes to the new corporation. Gewin v. Mt. Pilgrim Baptist Church (1910), 116 Ala. 345, 51 So. 947, 139 Am. St. Rep. 41.

[13] Waterman, *A Treatise on the Law of Corporations,* I, nn. 172, 173. Religious Corporation Securities are exempted from the operation of the Securities Act, 15 U. S. C. A. 77c.

[14] Zion Church of Sterling v. Mensch (1899), 178 Ill. 225, 52 N. E. 858; affirming 74 Ill. App. 115.

[15] Thus, a mortgage given by a New York religious corporation was executed by all of the trustees except one who had resigned, but there was no order or resolution of the board directing the execution. The referee found that in executing the mortgage the trustees acted as a board of trustees, and that though all who signed it were not present at the same time, yet a majority of the trustees were present part of the time when it was executed. The mortgage was held to be as binding as if a formal resolution had been

its property to trustees for the benefit of creditors, unless restrained by its charter or by statute.[16]

The State of New York, however, has adopted a policy which is unique. The only way a parish can be divided is by an act of the legislature. Moreover, a religious corporation must obtain the consent of the court before it can proceed to dispose of any of its property.[17] But an imperfect and invalid conveyance will be sufficient to lay a foundation for adverse possession.[18] Historically, the New York doctrine seems to find its origin in the English common law. During and following the reign of Queen Elizabeth, many statutes had been passed restricting the absolute power of church corporations to alienate their property.[19] Somehow this part of the body of the English common law became implanted in the New York colony when the English took it over from the Dutch, although neighboring English colonies from the very first never recognized the principle. The non-existence of ecclesiastical courts in the colonies to handle properly such matters further confused the situation. The civil courts had no precedents upon which to base their decisions.[20]

This restriction of the English common law on the absolute powers of church corporations to dispose of their properties, "together with the powers which equity had over the real estate of church corporations under the trustee corporation theory, which flourished in the State until 1850, cast a doubt over the title conveyed by any such corporation. It therefore became the practice to petition the legislature for leave to sell, so as to be able to convey

previously passed. South Baptist Society in City of Albany v. Clapp (1853), 18 Barb. (N. Y.) 35, 47.

[16] De Ruyter v. Trustees of St. Peter's Church (1850), 3 N. Y. 238.

[17] Brown, *The Canonical Juristic Personality,* pp. 174, 182.

[18] Madison Avenue Baptist Church v. Baptist Church in Oliver St. (1878), 73 N. Y. 82.

[19] Dignan, *History of the Legal Incorporation of Catholic Church Property in the United States,* p. 1; Waterman, *A Treatise on the Law of Corporations,* n. 171.

[20] *Cf.* De Ruyter v. Trustees of St. Peter's Church (1848), 3 Barb. Ch. (N. Y.) 119, 122, affirmed (1850), 3 N. Y. 238, cited with approval in Wyatt v. Benson (1857), 23 Barb. (N. Y.) 327; Dudley v. Congregation of Third Order of St. Francis (1893), 138 N. Y. 451, 456, 34 N. E. 281.

a clear title. This proved to be burdensome, both to the petitioners and to the legislature. A statute was therefore passed in 1806 and re-enacted in 1813, as part of the Religious Incorporation Act, making it lawful for the chancellor, on the application of any religious corporation, in case he should deem it proper, to make an order for the sale of any of its real estate and to direct the application of its moneys arising therefrom to such uses as the corporation, with the consent and approbation of the chancellor, should conceive to be most for its interest."[21]

With such a statute as a background it can be seen at a glance that church corporations will be severely hampered by the courts in the disposal of property. In the litigation that ensued it was gradually defined by the courts that the statute, though permissive in terms—"it is lawful for the chancellor"—actually forbids sales of real property by church corporations unless the consent of the courts was obtained.[22] The sale of real estate was even construed to include its mortgaging.[23] This seriously impaired a common-law right and therefore the tendency was rather toward strict construction. The concept of a church corporation was strictly understood.[24] The meaning of sale did not include such transactions as an agreement to sell, a sale in partition action, the gift of a deed, or a purchase-money mortgage.[25]

However, the policy of the freedom of action of church bodies has dictated that the courts of New York by the statute have solely a regulatory and permissive power over the disposal of ecclesiastical

[21] Zollman, *American Church Law,* n. 180.

[22] Dudley v. Congregation of Third Order of St. Francis (1893), 138, N. Y. 451, 456, 457, 34 N. E. 281.

[23] In re St. Ann's Church (1862), 23 How. Prac. (N. Y.) 285, 14 Abb. Prac. 424; see cases cited in Moore v. Rector, etc., of St. Thomas Church (1873), 4 Abb. N. C. (N. Y.) 51.

[24] See Feiner v. Reiss (1904), 98 App. Div. 40, 90 N. Y. S. 568, and Congregation Beth Elohim v. Central Presbyterian Church (N. Y. 1871), 10 Abb. Prac. (N. S.) 484, 489.

[25] See cases: Congregation Beth Elohim v. Central Presbyterian Church (N. Y. 1871), 10 Abb. Prac. (N. S.) 484; Bowen v. Trustees of Irish Presbyterian Congregation (1860), 19 N. Y. Super. Ct. 245.

property. In no manner does their jurisdiction extend to direct power. The agreement of the church corporation is the controlling factor and that body retains the option whether to sell or not to sell.[26] The authorization of the court is simply necessary in order to give the deed regularity of form. A New York church corporation, therefore, "has the title to its real property, may determine when it should be sold, and has the sole and exclusive power to enter into contracts for that purpose. The only distinction which exists between its power of alienation and that possessed by other corporations, is, that the consent of the court is necessary."[27]

It is unfortunate that this statute should remain in the legislation of New York State since "in its ordinary applications, it inevitably degenerates into a mere matter of form."[28]

The saner attitude of the other State jurisdictions is reflected by a Pennsylvania court [29] when it says: "There is no good reason why a perpetual restraint should be placed upon the alienation of the estate of religious societies. That which is suited to the present, by a change of times becomes unfit for the future. The unpretending church or modest parsonage or primitive schoolhouse of a village or borough town becomes unsuited to the growth, situation and progress of taste and culture of a large city. The ground itself often becomes the most valuable possession, and by a sale may greatly add to the welfare of the body, enabling it to erect finer edifices, better adapted to the change of times and circumstances. Conversion is not destruction, and can be made for the benefit of the trust. No solid objection lies to the change of church property so long as its true purpose is preserved. A sale is frequently the best mode of executing the trust."

With such a rare exception as the New York doctrine set forth above, there are no statutory enactments in the other states of the

[26] Bowen v. Trustees of Irish Presbyterian Congregation (1860), 19 N. Y. Super. Ct. 245, 266, 267.

[27] Congregation Beth Elohim v. Central Presbyterian Church (N. Y. 1871), 10 Abb. Prac. (N. S.) 484, 488.

[28] Zollman, *American Church Law,* n. 184.

[29] Burton's Appeal (1868), 57 Pa. 213, 218.

Union that restrict the power of religious corporations to dispose freely of their property. The power is absolute, and the courts will construe it to include sale, mortgage, lease, loan, and all manner of contracts essential to the corporate existence and functioning of the religious society.

Two important considerations, however, must be borne particularly in mind. First, the conditions, if any, under which the corporate property is held, and second, the charter of incorporation itself. Thus, the assurance that the state laws under which the corporation is operating authorize the proposed alienation is not available if the property, instead of being held free and clear, is held upon certain conditions, such as that it is not to be sold, or if it was donated conditional upon certain definite and specified uses and purposes. As to the general law itself, it varies according to the different forms of church corporations existing under the state laws where in some the consent of a majority of the trustees or officers is necessary to an act of alienation, and in addition the consent of the bishop in accordance with the Canon Law.

The restrictions on the powers of disposal will be primarily internal. The state courts have taken a liberal attitude toward religious societies and have allowed them wide latitude in their corporate discretion. There is no indication of any noticeable trend in present legislation pointing to substantial departures from the current policy of the law.

BIBLIOGRAPHY

Sources

Acta Apostolicae Sedis, Romae, 1909.

Acta Sanctae Sedis, 41 vols., Romae, 1865-1908.

Acta et Decreta Concilii Plenarii Americae Latinae,, 2 vols., 1902.

Acta et Decreta Concilii Plenarii Baltimorensis II (1866), Baltimorae, 1894.

Acta et Decreta Concilii Plenarii Baltimorensis III (1884), Baltimorae, 1886.

Acta et Decreta Sacrorum Conciliorum Recentiorum (Collectio Lacensis), 7 vols., Friburgi Brisgoviae, 1870-1890.

Beverege, William,, *Codex Canonum Ecclesiae Primitivae,* London, 1678.

Canones et Decreta Concilii Tridentini, ed. Richter-Schulte, Lipsiae, 1853.

Codex Juris Canonici, Pii X Pontificis Maximi jussu digestus, Benedicti Papae XV auctoritatae promulgatus, Romae, 1918.

Codex Theodosianus, Libri XVI, ed. Krueger-Mommsen, Berolini, 1905.

Codicis Juris Canonici Fontes, cura Emi. Petri Card. Gasparri editi, 7 vols., Romae, 1922-1935.

Collectanea in usum Secretariae Sacra Congregationis Episcoporum et Regularium, ed. Bizzarri, Romae, 1885.

Collectanea Sacrae Congregationis de Propaganda Fidei, 2 vols., Romae, 1907.

Corpus Juris Canonici, editio Lipsiensis Secunda post Aemilii Richteri curas . . . instruxit Aemilius Friedberg, 2 vols., Lipsiae, 1922.

Corpus Juris Civilis, vol. I, *Institutiones*—recognovit P. Krueger; vol. II, *Codex Justinianus*—recognovit et retractavit P. Krueger; vol. III, *Novellae Constitutiones*—R. Schoell; opus Schoelli morte interceptum absolvit G. Kroll, Berolini, 1928-1929.

Denzinger, H.-Bannwart, C., *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum,* 16-17 ed., Friburgi Brisgoviae, 1928.

Hardouin, Jean, *Acta Conciliorum et Epistolae Decretales ac Constitutiones Summorum Pontificum,* 12 vols., Parisiis, 1715.

Hinschius, Paulus, *Decretales Pseudo-Isidorianae et Capitula Angilramni,* Lipsiae, 1863.

Kirch, Conrad, *Enchiridion Fontium Historiae Ecclesiae Antiquae,* 4 ed., Friburgi Brisgoviae, 1923.

Leges Novellae ad Theodosianum pertinentes, ed. Mommsen-Meyer, Berolini, 1905.

Mansi, J. D., *Sacrorum Conciliorum Nova et Amplissima Collectio,* 58 vols., Arnheim, 1901-1927.

Migne, P. J., *Patrologiae Cursus Completus*—Series Latina, 221 vols. (M. P. L.), Parisiis, 1844-1855; Series Graeca, 161 vols. (M. P. G.), Parisiis, 1857-1866.

Quinque Compilationes Antiquae, ed. Friedberg, Lipsiae, 1882.

Riccobono, Salvator, *Fontes Juris Romani Antejustiniani,* Florentiae, 1909.

Rouët de Journel, *Enchiridion Patristicum,* 6-7 ed., Friburgi Brisgoviae, 1929.
Thesaurus Resolutionum Sacrae Congregationis Concilii, 167 vols., Romae, 1718-1908.

Reference Works

Aichner, S., *Compendium Juris Ecclesiastici,* Brixinae, 1887.
Alciatus, *Glossa in Novellas Justiniani,* Lugduni, 1553.
Altessera, A., *Opera Omnia,* 11 vols., Neopoli, 1777-1780.
André, Abbé, *Cours Alphabétique et Methodique de Droit Canon,* 2 vols., Paris, 1844.
d'Annibale, J., *Summula Theologiae Moralis,* 5 ed., Romae, 1908.
Antonius de Butrio, *Commentaria in quique Libros Decretalium,* Venetiis, 1578.
Avanzini, *De Constitutione "Apostolicae Sedis,"* Romae 1874.
Ayrinhac, H. A., *Administrative Legislation in the New Code of Canon Law,* New York, 1930.
[Bachofen], Charles Augustine, *A Commentary on the New Code of Canon Law,* 4 ed., 8 vols., St. Louis, 1921-1929.
Badius, C., *Institutiones Juris Canonici,* vol. II, Florentiae, 1922.
Baldus de Ubaldis, *Commentarius super tribus prioribus libris Decretalium,* Lugduni, 1585.
Barbosa, Aug., *Jus Ecclesiasticum Universum,* Lugduni, 1660.
Bargilliat, M., *Praelectiones Juris Canonici,* vol. II, 37 ed., Parisiis, 1923.
Barrett, J., *A Comparative Study of the Councils of Baltimore and the Code of Canon Law,* Washington, 1932.
Bartlett, C., *The Tenure of Parochial Property in the United States of America,* Washington, 1926.
Battifol, Card., *L'Eglise naissante et le Catholicisme,* 7 ed., Paris, 1919.
Benedictus XIV, *De Synodo Dioecesana,* 2 vols., Romae, 1806.
Berardi, Carolus, *Gratiani Canones Genuini ab Apocryphis Discreti, Corrupti ad emendationem Codicum Fidem exacti, Difficiliores Commoda Interpretatione Illustrati,* 4 vols., Venetiis, 1777.
Bernardus Papiensis, *Summa Decretalium,* Ratisbonae, 1860.
Blat, A., *Commentarium Textus Codicis Juris Canonici,* 5 vols., Romae, 1921-1927.
Bogert, G. G., *The Law of Trusts and Trustees,* 7 vols., St. Paul, 1935.
Bonacina, M., *Opera Omnia,* 3 vols., Venetiis, 1705.
Bondroit, A., *De Capacitate Possidendi Ecclesiae necnon de Regio Proprietatis vel Dispositionis Dominio in Patrimonio Ecclesiastico Aetate Morovingica (a. 481-751),* tom. I, Lovanii, 1900.
Boudinhon, *Biens de l'Eglise et Peines Canoniques,* Paris, 1909.
Bouscaren, T. L., *The Canon Law Digest,* Milwaukee, 1934.
Brinz, *Lehrbuch der Pandekten,* Erlangen, 1860.
Brown, B., *The Canonical Juristic Personality with Special Reference to its Status in the United States of America,* Washington, 1927.

Bucceroni, J., *Institutiones Theologiae Moralis,* 2 ed., Romae, 1893.
Buckland, W., *A Textbook of Roman Law,* Cambridge, 1921.
Cance, A., *Le Code de Droit Canonique,* 2 ed., 3 vols., Paris, 1929.
Cappello, F. M., *De Censuris Juxta Codicem Juris Canonici,* Taurini, 1919.
Cappello, F. M., *Summa Juris Publici, Romae,* 1923.
Catholic Encyclopedia, The, 17 vols., New York, 1907-1922.
Chelodi, J., *Jus de Personis,* 2 ed., Tridenti, 1927.
Cicognani, A. G., *Canon Law,* Philadelphia, 1934.
Claeys-Bouuaert, Simenon, *Manuale Juris Canonici,* 2 ed., 3 vols., Wettern, 1926.
Cocchi, G., *Commentarium in Codicem Juris Canonici,* 7 vols., Taurini, 1925-1930.
Collinet, P., et Gifford, A., *Precis de Droit Romain,* vol. I, Paris, 1926.
Consultationes Juris Canonici, vol. I, Romae, 1934.
Conte a Coronata, M., *Institutiones Juris Canonici,* Taurini, 1931.
Cornil, *Droit Romain,* Bruxelles, 1921.
Cujacius, *Opera,* tomus X, Prati, 1840.
Cuq, *Manuel des Institutions Juridiques des Romains,* 2 vols., Paris, 1891-1902.
DeAngelis, P., *Praelectiones Juris Canonici et Methodum Decretalium Gregorii IX exactae,* 4 vols, Romae, 1877-1887.
DeBranbandere, *Juris Canonici et Juris Canonico-Civilis Compendium,* Brugis, 1869.
DeCamillis, *Institutiones Juris Canonici,* 3 vols., Parisiis, 1863.
DeLuca, *Il Dottore Volgare,* 10 vols., Roma, 1673.
DeMeester, A., *Juris Canonici et Juris Canonico-Civilis Compendium,* 3 vols., Brugis, 1921-1928.
Devoti, J., *Jus Canonicum Universum,* vol. II, Romae, 1837.
Dictionnaire de Droit Canonique, fasc. II, Paris, 1928.
Dignan, *History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932),* Washington, 1933.
Doheny, W., *Church Property: Modes of Acquisition,* Washington, 1927.
Duchesne, L., *Histoire Ancienne de l'Eglise,* vol. I, 3 ed., Paris, 1923.
Durandus, G., *Speculum Juris,* 3 vols., Venetiis, 1577.
Eichmann, E., *Lehrbuch des Kirchenrechts auf Grund des Codex Juris Canonici,* 2 ed., Paderborn, 1926.
Fagnanus, Prosper, *Commentaria in quinque Libros Decretalium,* 4 vols., Venetiis, 1696.
Ferraris, L., *Bibliotheca Canonica, Juridica, Moralis, Theologica,* ed. novissima, 9 vols., Romae, 1885-1889.
Fournier, P., *Les Collections Canoniques attribués a Yves de Chartres,* Paris, 1897.
Fournier-Lebras, *Histoire des Collections Canoniques en Occident,* 2 vols, Paris, 1931-1932.

Franciscus de Zabarellis, *Commentaria in quinque libros Decretalium,* Venetiis, 1602.

Genicot-Salsmans, *Institutiones Theologiae Moralis,* 11 ed., 2 vols., Bruxellis, 1927.

Gillet, *La Personnalité Juridique en Droit Ecclesiastique,* Malines, 1927.

Girard, *Manuel Elémentaire de Droit Romain,* 7 ed., Paris, 1924.

Girard, *Textes de Droit Romain,* 5 ed., Paris, 1923.

Gothofredus, Jacobus, *Codex Theodosianus cum perpetuis Commentariis,* ed. nova, 6 vols., Lipsiae, 1736.

Grandclaude, E., *Jus Canonicum,* 3 vols., Parisiis, 1882.

Grashof, Otto, "Die Gesetze der Römischen Kaiser über die Veräusserung des Kirchlichen Vermögens," *AKKR,* XXXVI (1876), 203.

Gudelinus, *De Jure Novissimo Libri Sex Commentariorum,* Florentiae, 1839.

Hannan, J., *The Canon Law of Wills,* Washington, 1934.

Hefele-Leclerc, *Histoire des Conciles,* 9 vols., Paris, 1908-1921.

Hergenroether, P., *Lehrbuch des Katholischen Kirchenrechts,* Freiburg im Breisgau, 1888.

Heiner, *Katholisches Kirchenrecht,* Paderborn, 1909.

Hofmeister, P., *Bischof und Domkapitel,* Neresheim, 1931.

Hollweck, J., *Die kirchlichen Strafgesetze,* Mainz, 1899.

Hostiensis, Henricus de Segusia, cardinalis Ostiensis, *Summa Aurea super titulis Decretalium,* Venetiis, 1581.

Huebler, *Der Eigenthümer des Kirchengutes,* Leipzig, 1868.

Ihering, *L'Esprit du Droit Romain* (transl. by De Meulenaere), Paris, 1888.

Johannes Andreae, *Novella Commentaria in Decretales Gregorii IX—Novella super Sexto—Commentaria super Regula Juris,* 4 vols., Venetiis, 1612.

Knecht, August, *System des Justinianischen Kirchenvermögensrechtes,* Kirchenrechtliche Abhandlungen, hrsg. v. Dr. Ulrich Stutz, 22 Heft, Stuttgart, 1905.

Koeniger, A., *Katholiches Kirchenrecht,* Freiburg im Breisgau, 1926.

Kormann, Karl, *Die Kirchenrechtlichen Veräusserungsbeschränkungen beim Katholischen Kirchengut und das Burgerliche Recht,* Kirchenrechtliche Abhandlungen. hrsg. v. Dr. Ulrich Stutz, 42 Heft, Stuttgart, 1907.

Lancelottus, J. P., *Institutiones Juris Canonici et Glossa,* Lugduni, 1579.

Laurentius, *Institutiones Juris Ecclesiastici,* Friburgi Brisgoviae, 1903.

Leage, R. W., *Roman Private Law,* 2 ed., London, 1930.

Leech, G., *A Comparative Study of the Constitution "Apostolicae Sedis" and the "Codex Juris Canonici,"* Washington, 1922.

Maassen, F., *Geschichte der Quellen und der Literatur des canonischen Rechts,* vol. I, Gratz, 1870.

May G., *Eléments de Droit Romain,* 13 ed., Paris, 1920.

Meehan, A., *Compendium Juris Canonici,* Roffae, 1899.

Moyle, *Imperatoris Justiniani Institutiones,* 5 ed., Oxford, 1923.

Munerati, D. M., *Juris Ecclesiastici Publici et Privati Elementa,* Romae, 1926.

Navarrus, *Opera Omnia,* 6 vols., Venetiis, 1618.
Noval, J., *De Processibus,* 2 vols., Romae, 1920.
Oesterle, *Praelectiones Juris Canonici,* vol. I, Romae, 1931.
Ojetti, B., *Commentarium in Codicem Juris Canonici,* 4 vols., Romae, 1928.
Pallottini, *Collectio Resolutionum Sacrae Congregationis Concilii,* 17 vols., Romae, 1868.
Panormitanus, Abbas (Nicholaus de Tudeschis), *Commentaria in quinque Libros Decretalium,* 8 vols., Venetiis, 1588.
Pejska, J., *Jus Canonicum Religiosorum,* 3 ed., Friburgi Brisgoviae, 1927.
Pennacchi, J., *Commentaria in Constitutione "Apostolicae Sedis,* 2 vols., Romae, 1883.
Pirhing, Henricus, *Jus Canonicum in quinque Libros Decretalium,* 4 vols., Venetiis, 1630.
Pistocchi, M., *De Bonis Ecclesiae Temporalibus,* Taurini, 1932.
Poschinger, *Das Eigenthum am Kirchenvermögen,* Munchen, 1871.
Pruemmer, D., *Manuale Juris Canonici,* 4, 5 ed., Friburgi-Brisgoviae, 1927.
Raus, J. B., *Institutiones Canonicae,* Parisiis, 1923.
Redoano, G., *De Alienationibus Rerum Ecclesiasticarum,* Placentiae, 1589.
Reiffenstuel, A., *Jus Canonicum Universum,* 7 vols., Venetiis, 1735.
Restatement of the Law of Contracts as Adopted and Promulgated by the American Law Institute, 2 vols., St. Paul, 1932.
Rittershutius, *Expositio Methodica Novellarum,* Florentiae, 1839.
Rivet, L., *Institutiones Juris Ecclesiastici Privati,* 2 vols., Romae, 1914.
Rivet, L., *Le régime des biens de l'Eglise avant Justinien,* Lyon, 1891.
Roberti, F., *De Processibus,* 2 vols., Romae, 1926.
Robinson, W., *Elementary Law,* ed. nova, Boston, 1910.
Roby, *Roman Private Law,* 2 vols., Cambridge, 1902.
Saegmueller, J. B., *Lehrbuch des Katholischen Kirchenrechts,* 3 ed., 2 vols., Freiburg-im-Breisgau, 1914.
Sanguineti, *Institutiones Juris Ecclesiastici Privati,* Romae, 1884.
Santi, F., *Praelectiones Juris Canonici,* 4 ed., 5 vols., Ratisbonae, 1886.
Savigny, *Traité de Droit Romain* (transl. by Grenoux), Paris, 1841.
Schmalzgrueber, F., *Jus Ecclesiasticum Universum,* 12 vols., Ingolstadii, 1728.
Schoensteiner, *Kanonische Quellenlehre,* Wien, 1928.
Schulte, J. F. von, *Die Geschichte der Quellen und Literatur des Kanonischen Rechts,* 3 vols., Stuttgart, 1875.
Scott, *The Civil Law* (translation of the "Corpus Juris Civilis" of Justinian), 17 vols., Cincinnati, 1932.
Séjourné, Paul, *Saint Isidore de Séville,* Paris, 1929.
Sherman, C. P., *Roman Law in the Modern World,* 3 ed., 3 vols., New Haven, 1922.
Singer, H., *Die Summa Decretorum des Magister Rufinus,* Paderborn, 1902.
Sipos, Stephanus, *Enchiridion Juris Canonici,* Pecs, 1926.
Smith, S. B., *Elements of Ecclesiastical Law,* 7 ed., 3 vols., New York, 1882.

Sohm-Ledlie, *Institutes of Roman Law,* Oxford, 1926.
Staedtler, *Cours de Droit Romain,* 2 vols., Louvain, 1902.
Stephanus, *Glossae in Novellas,* Florentia, 1843.
Stutz, U., *Der Geist des Codex Juris Canonici,* Stuttgart, 1918.
Tardif, *Histoire des Sources du Droit Canonique,* Paris, 1887.
Tephany, *Constitutio "Apostolicae Sedis,* Tours, 1883.
Thomassinus, L., *Vetus et nova Disciplina Ecclesiastica circa Beneficia et Beneficiarios,* 10 vols., Moguntiaci, 1786, 1787.
Torricelli, J. D., *De Rebus Ecclesiae non Alienandis, ex Sententiis Sacrae Romanae Rotae Tractatus,* Ferrariae, 1674.
Vecchiotti, S., *Institutiones Canonicae,* 3 vols., Taurini, 1875.
Vermeersch, A.,-Creusen, J., *Epitome Juris Canonici,* 4, 5 ed., 3 vols., Mechliniae, 1931-1933.
Vromant, G., *De Bonis Ecclesiae Temporalibus,* Lovanii, 1927.
Washburn, Emory, *A Treatise on the American Law of Real Property,* 6 ed., 3 vols., Boston, 1902.
Waterman, T. W., *A Treatise on the Law of Corporations,* 2 vols., New York, 1888.
Wernz, F. X., *Jus Decretalium,* vol. III, Romae, 1908.
Wernz-Vidal, *Jus Canonicum,* 6 vols., Romae, 1923-1928.
Williston, Samuel, *The Law of Contracts,* 4 vols., New York, 1920.
Zallinger, J. A., *Institutiones Juris Ecclesiastici,* 5 vols., Romae, 1823.
Zitelli, Z., *Apparatus Juris Ecclesiastici,* Romae, 1886.
Zollmann, C., *American Church Law,* 2 ed., St. Paul, 1933.

PERIODICALS

American Ecclesiastical Review (AER), Philadelphia, 1889—
Ami du Clergé, Langres, 1879—
Apollinaris, Romae, 1928—
Archiv für Katholisches Kirchenrecht (AKKR), Mainz, 1857—
Collationes Brugenses, Brugis, 1895—
Commentarium pro Religiosis (CpR), Romae, 1920—
Ephemerides Theologicae Lovanienses (ETL), Lovanii, 1924—
Homiletic ond Pastoral Review, The (HPR), New York, 1900—
Il Monitore Ecclesiastico, Roma, 1879—
Irish Ecclesiastical Record (IER), Dublin, 1864—
Jus Pontificum (JP), Romae, 1921—
Le Canoniste Contemporain, Paris, 1881-1926.
Nouvelle Revue Théologique (NRT), Louvain, 1869—
Periodica de re canonica et morali, Brugis, 1905—; ab anno 1927: *Periodica de re canonica, morali, liturgica.*
Zeitschrift der Savigny Stiftung—Römische Abteilung, Weimar, 1880—*Kanonistische Abteilung,* Weimar, 1911.

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CANON LAW STUDIES

1. Freriks, Rev. Celestine A., C.PP.S., J.C.D., Religious Congregations in Their External Relations, 121 pp., 1916.
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